Supreme Court, U.S.
FILED

No. 96 62 JUN 25 1996

OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1995

JOSEPH J. VOYTEK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER W. KATZENBACH
Counsel of Record
KATZENBACH AND KHTIKIAN
Attorneys at Law
1714 Stockton Street, Suite 300
San Francisco, California 94133-2930
(415) 834-1778

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

109PP

QUESTIONS PRESENTED

This case presents the following questions arising under the Americans With Disabilities Act and the Rehabilitation Act of 1973, as these laws apply to persons with a mental disability:

1. On the question whether an employee was a "qualified individual with a disability" within the meaning of the Americans With Disabilities Act and the Rehabilitation Act of 1973, should the courts defer to the opinion of a private psychiatrist, retained by the employer, that an employee's mental condition made him unsuitable to handle the stress of a management-level job?

2. Does the Americans With Disabilities Act apply to employees who were seeking job accommodations from their employer on the effective date of the law?

LIST OF PARTIES

The parties to the proceedings below and before this court are:

1. Joseph J. Voytek
2. The University of California
3. The Regents of the University of California.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

REGULATIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 12

I. ON THE QUESTION WHETHER THE EMPLOYEE WAS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973, COURTS SHOULD NOT DEFER TO THE OPINION OF A PRIVATE PSYCHIATRIST, RETAINED BY THE EMPLOYER, THAT AN EMPLOYEE'S MENTAL CONDITION MADE HIM UNSUITABLE TO HANDLE THE STRESS OF A MANAGEMENT-LEVEL JOB. 12

II. THE AMERICANS WITH DISABILITIES ACT APPLIES TO EMPLOYEES WHO WERE SEEKING JOB ACCOMMODATIONS FROM THEIR EMPLOYER ON THE EFFECTIVE DATE OF THE LAW. 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Choate (1985) 469 U.S. 287 13

Bazemore v. Friaday (1986) 478 U.S. 385 20

School Bd. of Nassau County, Fla. v. Arline
(1987) 480 U.S. 273 . . . . . 5, 13, 14, 16

Federal Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2101(c) 1

Americans With Disabilities Act of 1990
42 U.S.C. § 12101, et seq. 2
Section 3 (42 U.S.C. § 12102(2)) 13
Section 101(9)(B) (42 U.S.C. § 12111(9)(B)) . 18
Section 107 (42 U.S.C. § 12117) 6
Section 108 (104 Stat. 337) 20, 21

Rehabilitation Act of 1973
Section 7(8)(B) (29 U.S.C. sec. 706(8)(B)) . . 13
Section 504 (29 U.S.C. § 794) 5
Section 505 (29 U.S.C. § 794a). 6

Civil Rights Act of 1964
Section 706(f)(3) (42 U.S.C. § 2000e-5(f)(3)) . . 6

Regulations

Equal Employment Opportunity Commission
29 C.F.R. Part 1630, §1630.2(r) 16
EEOC Interpretive Guidelines on the ADA
29 C.F.R. Part 1630, Appendix . 15, 18, 19
Department of Education
34 C.F.R. § 104.12(b)(2) 18
34 C.F.R. § 104.12(d) 5, 19

Department of Heath, Education & Welfare
45 C.F.R. § 84.12(d) 19

Rules

U.S.Sup.Ct. Rule 13.1 1
U.S.Sup.Ct. Rule 13.3 1

Texts

National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990 . . . . . 6, 12, 17

Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986. . . . . .6, 12, 17

Mintz, J., et al.; Treatments of Depression and the Functional Capacity to Work, *Arch.Gen.Psychiatry* 1992; 49:761-768 . . . . . 6, 17

PETITION FOR WRIT OF CERTIORARI

Joseph J. Voytek ("Voytek" or "Petitioner") respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on February 14, 1996.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Ninth Circuit filed February 14, 1996, is not officially published and is reprinted at App. pages A47-A49, *infra*. Its unofficial citations are 77 F.3d 491 and 1996 WL 65243. The Order and Judgment of the United States District Court for the Northern District of California is not officially published and is reprinted at App. pages A1-A45, *infra*. The District Court's opinion is unofficially published at 6 A.D.D. 1137, 5 N.D.L.R. ¶ 343, 1994 WL 478805. The Order filed March 27, 1996, denying rehearing is unpublished and is reprinted at App. page A50, *infra*.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 14, 1996. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on February 14, 1996. On March 27, 1996, the Ninth Circuit denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed with this Court under 28 U.S.C. § 2101(c) and U.S.Sup.Ct. Rule 13.1 and 13.3.

STATUTES INVOLVED

1. Section 504(a) of the Rehabilitation Act of 1973, as amended as of 1988 (29 U.S.C. § 794(a)) prior to amendments conforming the Rehabilitation Act to the Americans With Disabilities Act (P.L. 102-569, 106 Stat. 4360) provides, in relevant part:

> "No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program of activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."

2. Section 101(8) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111(8)) provides:

> "QUALIFIED INDIVIDUAL WITH A DISABILITY.--The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written job description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

3. Section 101(9) of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12111(9)) provides, in relevant part:

> "REASONABLE ACCOMMODATION.--The term 'reasonable accommodation' may include--
>
> "(B) job restructuring, part-time of modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities."

4. Section 102 of the Americans With Disabilities Act of 1990 (42 U.S.C. § 12112) provides, in relevant part:

> "(a) GENERAL RULE.--No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employment compensation, job training, and other terms, conditions, and privileges of employment.
>
> "(b) CONSTRUCTION.--As used in subsection (a) of this section, the term 'discriminate' includes--
>
> "(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would

impose an undue hardship on the operation of the business of such covered entity; or

"(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant."

6. Section 108 of the Americans With Disabilities Act of 1990 (104 Stat. 337) provides:

"This title shall become effective 24 months after the date of enactment (July 26, 1990)."

REGULATIONS INVOLVED

1. The Department of Education Rehabilitation Act regulations (34 C.F.R. Part 104) provide in relevant part:

34 C.F.R. § 104.3:

"(k) *Qualified handicapped person* means:

"(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question".

34 C.F.R. § 104.12:

"(a) A recipient shall make reasonable

accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

"(b) Reasonable accommodation may include: * * * (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions."

"(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant."

STATEMENT OF THE CASE

This case presents an important issues as to the duty of employers to accommodate mental disabilities of their employees, as required by the Americans with Disabilities Act and the Rehabilitation Act of 1973 and whether the ADA is effective for employees whose efforts to seek accommodation began prior to its effective date but continued after the law went into effect. In particular, this case directly raises the question whether courts should defer to the opinion of a private psychiatrist that an employee's mental condition made him unable to handle the stress of a management-level job. This is an important question this Court noted, but left open, in School Bd. of Nassau County, Fla. v. Arline (1987) 480 U.S. 273, 288 n. 18, and which it should now resolve.

Jurisdiction of the district court was invoked under

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) and under the Americans With Disabilities Act of 1990 ("ADA") (42 U.S.C. § 12101 et seq.) pursuant to section 505 of the Rehabilitation Act (29 U.S.C. § 794a), section 107 of the ADA (42 U.S.C. § 12117) and section 706(f)(3) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(3)).

This case arises from Petitioner's efforts to seek work accommodation at his job at the University of California in Berkeley because he suffers from a mental condition known as Major depression.[1]

Granting the University's motion for Summary Judgment, the District Court concluded that Petitioner's mental disability made it impossible for him to perform the functions of a management-level position and that there was no reasonable way his mental disability could be accommodated by the University (App. pp. A20-A40). In reaching this conclusion, the District Court relied on the opinion of Dr. Melvin Lipsett, a psychiatrist retained by the University to examine Petitioner in connection with his claim for disability benefits (App. pp. A5-A8). On the basis of this psychiatric opinion, the District Court concluded that Petitioner was not qualified for the job he held and that the University was justified in refusing to restructure Petitioner's to accommodate this disability (App. pp. A28, A31-32, A35-

---

[1] See generally, Mintz, J., et al.; Treatments of Depression and the Functional Capacity to Work, *Arch.Gen.Psychiatry* 1992; 49:761-768 (Mintz, "Treatments of Depression"); National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990; Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986.

A39, A39-A40).[2]

The District Court also concluded that the Americans With Disabilities Act did not apply Petitioner's continuing efforts to obtain accommodation at the University during the period he was on disability leave since these efforts began before the effective date of the ADA (App. p. A44-A45).

On appeal, the Ninth Circuit affirmed the District Court. The Ninth Circuit also concluded that Petitioners disability made him unqualified for his job because "he could not carry out his duties as associate director due to his inability to handle the stress of a management-level position" (App. p. A48).

Petitioner seeks review in this Court to set aside the lower courts' decisions which have undermined the protections of federal law for employees with mental disabilities by making the opinion of a psychiatrist retained by the employer conclusive on the issue of Petitioner qualifications for his job and the ability of the University to accommodate his disability. The material facts necessary to understand these issues are as follows:

In December 1989, Petitioner began working as an Associate Director, Program Planning and Resources ("PPR") at the Office of Environmental Health and Safety ("EH&S") at the University of California in Berkeley ("UCB").

After performing in Associate Director position for sightly over a year, Petitioner began to experience increasing fatigue because he was working excessive hours. Fearing that his increasing fatigue would bring on an episode of

---

[2] The District Court also concluded that a job offer of a related position at the University of San Francisco ("UCSF") and rehabilitation counseling satisfied any other remaining duty the University had to accommodate Petitioner's disability.

depression, Petitioner took an emergency medical leave in April 1991.

Upon returning to work two weeks later, Petitioner sought to have the duties of his position restructured to avoid excessive overwork and fatigue. In response, his supervisor, Julia Epley, Director of EH&S, stated that no changes in the job were possible.

Because Petitioner had taken emergency leave due to work stress, Petitioner was sent for a psychiatric examination in connection with California's workers compensation system. In early May 1991, he was examined by a physician, Dr. Melvin Lipsett, selected by the University.

Dr. Lipsett's initial written report placed no restrictions on Petitioner's work as Associate Director (App. p. A73, ¶ 13). In response to a telephone call from Dr. Lipsett indicating that he was placing no job restrictions on Petitioner, UC officials provided Dr. Lipsett information about work conflict between Petitioner and Epley which resulted in a change to Dr. Lipsett's medical opinion (id.). In late June, Dr. Lipsett issued a changed report which concluded that Petitioners was unable to perform the Associate Director job because of the stress of doing so threatened to bring on episodes of depression (App. pp. A6-A8).

As a result of Dr. Lipsett's changed report, on June 29, 1991, the University placed Petitioner on permanent disability leave.[3]

While on disability leave, Petitioner made numerous applications to various open positions at the University.

---

[3] In its various summary judgment papers, UC admitted that plaintiff was removed from his position at EH&S because of Dr. Lipsett's medical evaluation, not because of poor performance or lack of job-related qualifications.

Because of the medical limitations imposed on Petitioner that he could not function in the stressful environment of a management-level job, the University would not consider him for any management-level positions to which he applied (App. pp. A13-A17, A36).

Shortly after being placed on disability leave, Petitioner filed a grievance under the University's internal grievance procedure (App. pp. A11-A12, A77-A78). This procedure resulted in a decision by Vice Chancellor Daniel Boggan, Jr. which directed (App. p. A78):

> "you [Petitioner] * * * and Director Epley, to work very closely with Human Resources concerning issues of accommodation."

Petitioner accepted this proposal, but the University did not follow up on Vice Chancellor Boggan's directive. When Petitioner raised the issue that nothing was happening as to Boggan's direction to discuss accommodation, the University responded by letter of August 14, 1992, stating that Petitioner should initiate another internal review proceeding to challenge UC's failure to follow Boggan's directions (App. pp. A79-A80).

Dr. Lipsett's opinion formed the basis for the lower court's holding that, because of his mental condition, Petitioner could not meet the essential qualifications of the Associate Director position and that no accommodation of duties of that position were reasonably possible.[4] The

---

[4] The District Court expressed some confusion over the nature of Petitioner's disability and its effect on his ability to work (App. pp. A19-A20, A28), apparently because Dr. Lipsett described Petitioner's work problems as resulting from a "character defect" rather than from a depressive disorder. There was no reason for this confusion and no reason to believe that Petitioner's alleged "character defect" is materially different that his mental disability of Major depression. The diagnosis of Petitioner's mental condition as Major depression is long-

District Court cited two reasons for Petitioner's lack of qualifications (App. pp. A31-A32): First, the University's medical opinions that Petitioner "should not return to his job"(App. p. A31)[5] and second, Petitioner had "requested that the position be altered so that he would be capable of continuing in the position" (App. p. A32).

The District Court also concluded that no job accommodation was possible "since [Petitioner] could not mentally/emotionally handle the stress of managing more than a few employees, could not have a job with open-ended assignments, and that he should not work with Julia Epley" (App. p. A35). Again, Petitioner's disability was the very reason why no accommodation was possible: "The evidence is overwhelming that [Petitioner's] character structure combined with his depressive disorder made him incapable of fulfilling the responsibilities in a position such as the

---

standing (App. p. A69) and Dr. Lipsett's deposition testimony unequivocally stated that the danger to Petitioner of continuing at EH&S was the risk of a further episode of depression at some future time (App. p. A65, A66-A67). The work problems Dr. Lipsett identified as resulting from a "character defect" are characteristic of persons suffering from Major depression (Mintz, J., et al.; Treatments of Depression and the Functional Capacity to Work, *Arch.Gen.Psychiatry* 1992; 49:761-768 (Mintz, "Treatments of Depression"), at p. 766).

[5] In addition to Dr. Lipsett's opinion, the University offered the opinion of Dr. Michael M. Gamble. While Dr. Gamble agreed with the diagnosis of Petitioner as suffering from major depression, Dr. Gamble's opinion as to Petitioner's work abilities was more equivocal as to Petitioner's asserted inability to perform his job: Rather than asserting the Petitioner was unqualified for his job, Dr. Gamble would state only that "Voytek would not be suited to management-level positions", including the Associate Director position at EH&S and that Petitioner was "unwilling[] to accept some of the limitations placed upon him for his psychological well-being" (App. p. A59).

Associate Director position at EH&S" (App. p. A36). In rejecting Petitioner's various proposals that he could perform the essential job functions of the Associate Director with accommodation, the District Court again referred "to the overwhelming evidence that Mr. Voytek's condition requires that he have a job drastically different from the EH&S job" (App. p. A38).

Because of its conclusion that Petitioner was unqualified for the Associate Director position, with or without reasonable accommodation, the District Court held that, UC had reasonably accommodated Petitioner by offering him a comparable position at the University of California at San Francisco ("UCSF") in mid-June, shortly before being placed on disability leave, and providing him rehabilitation training in the 15 months thereafter (App. pp. A12-A13, A41-A42).[6]

---

[6] The District Court noted the Petitioner declined interest in the UCSF position because he felt that he was too exhausted at that point to try a new job and did not desire a demotion (App. p. A13-A14) but did not address whether this was a reasonable basis on which to decline the possible UCSF job. The District Court also noted, but gave no weight to, the outcome of the University's internal grievance procedure (App. pp. A11-A12).

REASONS FOR GRANTING THE WRIT

I. ON THE QUESTION WHETHER THE EMPLOYEE WAS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" WITHIN THE MEANING OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973, COURTS SHOULD NOT DEFER TO THE OPINION OF A PRIVATE PSYCHIATRIST, RETAINED BY THE EMPLOYER, THAT AN EMPLOYEE'S MENTAL CONDITION MADE HIM UNSUITABLE TO HANDLE THE STRESS OF A MANAGEMENT-LEVEL JOB.

Petitioner suffers from a depressive disorder that affects him and many other Americans in their jobs and lives. The national scope of these problems is well-documented in the medical literature on depression and its treatment. Depressive disorders affect over 17 million American adults (National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990). Major depression alone affects over 9 million American adults, almost half of the persons suffering from one of the three recognized kinds of depressive disorders (id.).[7] See also, Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986.

---

[7] The National Institute of Mental Health classifies Depressive (affective) disorders into three classes: Manic-depressive illness (Bipolar disorder), Major depression, and Dysthymia (National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990).

The Americans With Disabilities Act ("ADA")[8] and the Rehabilitation Act of 1973 protect Petitioner and other employees with mental disabilities from job discrimination based on stereotypes and assumptions as to what they can and cannot do.[9] These laws "protect[] handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fears * * *" (School Bd. of Nassau County, Fla. v. Arline (1987) 480 U.S. 273, 287):

> "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference--of benign neglect. * * * Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus" (Alexander v. Choate (1985) 469 U.S. 287, 295-296).

In School Bd. of Nassau County, Fla. v. Arline, *supra*, 480 U.S.at 280-288, this Court addressed the need to protect disabled employees from discrimination based on unfounded fears and stereotypes as to the risk of injury. In Arline, this Court addressed a physical condition, tuberculosis in a state of remission, and the fear that that disease would be contagious to others. This Court held that a non-imminent threat of future contagion was not enough to

---

[8] The ADA went into effect July 26, 1992, during the period Petitioner was on disability and seeking accommodation at the University.

[9] Both the ADA and the Rehabilitation Act cover employees with mental disabilities (29 U.S.C. sec. 706(8)(B); 42 U.S.C. §12102(2)).

justify a conclusion that the employee was unqualified for the position.[10]

In Arline, however, the employer's defense rested on its own, unsubstantiated fears that the employee's disease might be presently contagious (id., 480 U.S. at 284-286). This Court noted that there was no medical evidence offered on the issue of the risk of infection of others created by the employee's disability (id., 480 U.S. at 288).

This Court then described how the lower courts should address medical evidence on this subject (id., 480 U.S. at 288). As to public heath officials, this Court established a general rule that courts should defer to their medical judgment:

> "In making these findings [of risk to others], courts normally should defer to the reasonable medical judgments of public health officials" (id., 480 U.S. at 288).

However, while deferral to public health officials is to be the norm, this Court carefully left open the question whether courts should also defer to the medical opinions of private physicians (id., 480 U.S. at 288 n. 18). The Court expressly reserved decision on that issue (id., 480 U.S. at 288 n. 18):

> "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied."

This Petition presents the question left open in Arline: whether the courts should defer to the medical judgments of

---

[10] This Court remanded the case for specific findings, including medical findings as to the probability of transmission of the disease, and the duration and severity of the condition (id., 480 U.S. at 288-289).

private physicians retained by the interested employer.

In this case, the lower courts have deferred to the medical opinion of the University's psychiatrists that Petitioner was unable to handle the stress of a management-level job. By deferring to the medical opinions of Dr. Lipsett and Dr. Gamble, the lower courts have given controlling weight to these opinions rather than taking these opinions as simply one factor among others.

The result of this deference was to reintroduce stereotypes and patronizing attitudes towards disabled employees that the ADA and the Rehabilitation Act were intended to eliminate. This error is evident from the lower courts' uncritical claim that the medical evidence established that Petitioner was unable to handle the stress of a management-level job. While Dr. Lipsett, and to a degree Dr. Gamble, gave that general opinion, the health risk that the University's doctors identified was the risk that uncontrolled stress for Petitioner could result in an episode of depression sometime in the future (App. pp. A8, A65, A66-A67). This opinion rested entirely on the view of Dr. Lipsett, and later Dr. Gamble, that a less-stressful job would be more appropriate or best for Petitioner (App. pp. A6-A8, A53 ¶ 5, A57 ¶ 11, A59 ¶ 4): As Dr. Gamble put it, these "limitations [were] placed upon him for his psychological well-being" (App. p. A59 ¶ 4).

The unfocused fear that Petitioner would suffer some relapse into depression if he continued in a stressful management-level job is the kind of discrimination against disabled employees these laws prohibit. The EEOC's interpretive Guidelines on the ADA make this point directly (29 C.F.R. Part 1630, Appendix). In the Guideline under section 1630.2(r), Direct Threat, the EEOC states:

> "Generalized fears about risks from the employment environment, such as exacerbation of the disability caused by stress,

> cannot be used by an employer to disqualify an individual with a disability. For example, a law firm could not reject an applicant with a history of disabling mental illness based on a generalized fear that the stress of trying to make partner might trigger a relapse of the individual's mental illness."

To be sure, no employer is required to employ someone whose disability poses a real and immediate threat to his physical or mental health. This Court and Congress have already provided specific protection for employers in that situation, which allows consideration of medical opinions as well as other factors as to the immediacy, seriousness and ability to prevent or reduce that risk (School Bd. of Nassau County, Fla. v. Arline, *supra*, 480 U.S.at 287; see also ADA, 42 U.S.C. §12113(b); 29 C.F.R. Part 1630, §1630.2(r)).

But neither of the lower courts found that this limited defense was applicable in this case, nor would the medical evidence before the lower courts sustain such a finding. Dr. Lipsett testified expressly that the risk to Petitioner was merely a possibility, not a certainty (App. pp. A65, A67) and he could provide no medical opinion as to when, if at all, that possibility might occur (App. A65, A66-A67).

Instead, the lower courts considered the medical evidence on the basic issue of job qualification and deferred to the medical judgments that Petitioner was simply unqualified mentally for stressful work.

This Court is, therefore, presented with the stark issue that the lower courts have deferred entirely to the medical judgment of the University's psychiatrists that Petitioner was unqualified for his job because his disability makes him unsuited for stressful jobs. This is precisely the issue this Court left open in Arline and which this Court should now

address and resolve.

The significance of this issue is apparent. Depressive disorders affect millions American adults. National Institute of Mental Health, *Update*, August 1993, Number of U.S. Adults (in millions) with Mental Disorders, 1990; See also, Blazer, D., et al., The Prevalence and Distribution of Major Depression in a National Community Sample: The National Comorbidity Survey, *Am.J.Psychiatry* 1994; 151:979-986. As in Petitioner, these conditions affect the ability to work:

> "Depressive disorders are among the most prevalent psychiatric conditions, and impairment in occupational functioning is commonplace." (Mintz, "Treatments of Depression", *supra*, at p. 761).

At the same time, depressive disorders, and their impairment of occupational functioning, are highly susceptible to effective treatment and accommodation in the workplace. As the Mintz study cited above concluded:

> "Behavioral impairments, including missed time, decreased performance, and significant interpersonal problems are common features of depression that appear to be highly responsive to symptomatically effective treatment given adequate time." (Mintz, "Treatments of Depression", *supra*, p. 766).

At the same time, because the risk of depression may be increased in stressful occupations, few persons with such disabilities can guarantee their future health against all odds. Similarly, few employers will be unable to find a physician that will give a medical judgment that the employee's disability places them at risk if they continue in a stressful employment. As occurred here, the University was able to convince Dr. Lipsett to retract his initial opinion that Petitioner could safely return to work and issue a new

opinion that Petitioner was unable to perform his job safely under any conditions.

If a single opinion by a physician is conclusive as to the ability of a disabled employee to continue in their job, few disabled employees would be safe in their employment and the goals of the law would be easily frustrated. Few employees would risk seeking accommodations for fear that a resulting medical examination might declare them unqualified and jobless.[11] The ability of disabled employees to seek job accommodation would be undermined. As occurred here, Petitioner's mere request for job restructuring--a request expressly contemplated by the ADA and the Rehabilitation Act[12]--was interpreted by the district court as an additional fact demonstrating his inability to perform the Associate Director position at all (App. p. A32).

The alternative job at UCSF and later rehabilitation services are justifiable only if the lower count's deference to the University psychiatrists' medical opinions was justified. Both the ADA and the Rehabilitation Act require accommodation to an employee's present position before the alternative of a transfer to a different job could be considered.

The Rehabilitation Act regulations prohibit an employer from denying employment opportunities "if the basis for the denial is the need to make reasonable accommodation to the * * * mental limitations of the

---

[11] The EEOC's Interpretive Guidelines on medical examinations under the ADA indicate the a medical examination may be required if necessary to decide issues of accommodation (29 C.F.R. Part 1630, Appendix, Guidelines on Section 1630.14(c)).

[12] ADA, 42 U.S.C. § 12111(9)(B); Rehabilitation Act, regulations, 34 C.F.R. § 104.12(b)(2).

employee or applicant" (34 C.F.R. § 104.12(d)).[13] If Petitioner's disability could be accommodated in his position as Associate Director at EH&S, it would violate these regulations to remove him from the Associate Director position to avoid the need to make such accommodations. An offer of a different job cannot substitute for the need to make accommodations at an employee's existing position if such accommodations are possible.

The EEOC's ADA Guidelines make this point expressly (29 C.F.R. Part 1630, Appendix, discussion on Section 1630(2)(o), eighth paragraph):

> "Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship."

Accordingly, the lower courts consideration of alternative employment was necessarily based on the conclusion that no accommodation was possible within the Associate Director position. That conclusion, as Petitioner has shown, was based on the lower courts' deferral to the medical opinions of the University's psychiatrists.

---

[13] Identical requirements were contained in the initial Rehabilitation Act regulations issued by the Department of Heath, Education and Welfare (45 C.F.R. § 84.12(d)).

II. THE AMERICANS WITH DISABILITIES ACT APPLIES TO EMPLOYEES WHO WERE SEEKING JOB ACCOMMODATIONS FROM THEIR EMPLOYER ON THE EFFECTIVE DATE OF THE LAW.

The employment provisions of the ADA became effective on July 26, 1992 (104 Stat. 337). At that time, Petitioner was on disability leave and was still seeking accommodation from the University. Among other things, he was still on disability leave and seeking to have the accommodation discussion that had been ordered as a result of the University's internal grievance procedure (App. pp. A11-A12, A13-A17, A79-A80).

In Bazemore v. Friaday (1986) 478 U.S. 385, 395-6, this Court rejected the very position advanced by the lower courts in this case. Bazemore holds that each independent act of discrimination is an independent violation of the law, even when the discrimination began before the law's effective date.

In Bazemore, the employer attempted to justify the continuing effect of a discriminatory salary policy that paid African-Americans lower wages on the grounds that the salary policy was put into effect prior to the effective date of Title VII's application to state and local governments. This Court reversed, holding that each paycheck that the African-American employees received that was lower because of the prior discrimination was an independent and continuing violation of Title VII (id., 478 U.S. at 395-6).

In this case, the continuing refusal to accommodate Petitioner after the effective date of the ADA violated that law, regardless whether the discrimination began before the ADA took effect.

The lower courts' approach to the effective date of the ADA simply frustrates the application of the law.

Recognizing that the ADA imposed new requirements for employers, Congress delayed its effective date two years from the date the law was enacted to give employers time to prepare for it (see 104 Stat. 337). Once effective, however, the ADA was effective for all purposes. There is no exception in the ADA which would allow employers to refuse to accommodate the needs of existing employees simply because their disability was apparent before the ADA became effective or because they requested accommodation before the employer become legally obligated to proved an accommodation to them. The only relevant question is whether, when the ADA became the law, the employer was still in a position to accommodate a disabled employee. If so--and that is the case here--than the ADA applies.

CONCLUSION

For the foregoing reasons, Petitioner submits that a Writ of Certiorari should issue.

Respectfully submitted,

CHRISTOPHER W. KATZENBACH
Counsel of Record
KATZENBACH AND KHTIKIAN
Attorneys at Law
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
Telephone: (415) 834-1778

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN JOSEPH VOYTEK, Plaintiff, vs. THE UNIVERSITY OF CALIFORNIA and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendants.	))))))))))	No. C-92-3465-EFL ORDER GRANTING SUMMARY JUDGMENT

I. Introduction

This action was brought by plaintiff Joseph Voytek against the defendants, University of California and the Regents of the University of California ("UC") under section 504 of the Rehabilitation Act and the Americans With Disabilities Act ("ADA") alleging employment discrimination due to Mr. Voytek's mental disability.

Defendants brought the pending motion for summary judgment on two grounds, contending that (1) the ADA claim is barred because plaintiff's cause of action arose before the ADA effective date of July 26, 1992: and (2) the plaintiff has failed to establish a prima facie case under § 504 of the Rehabilitation Act. For the following reasons, the Court GRANTS summary judgment as to both claims.

II. Factual Background

Joseph Voytek began working for the University of California, Berkeley as an Associate Director in the Department of Environmental Health and Safety

("EH&S") in December of 1989. Mr. Voytek and the Director of EH&S, Julia Epley, discussed the possibility of Mr. Voytek moving from a temporary position as Acting Associate Director to a permanent management level position of Associate Director. Mr. Voytek participated in the creation of the new position and in drafting his own description. (Declaration of Julia Epley, ¶ 2, ["Epley Decl."].)

Mr. Voytek's job description dated February 7, 1990 states that the Associate Director was to be responsible for the following: (1) assisting the Director in the planning functions for the EH&S Department, (2) assisting the Director in developing Department programs, (3) developing the Department budget proposal and analyzing the budget, (4) finding effective methods of communicating legally required environmental, health, and safety information to the campus, (5) developing and maintaining a computerized data tracking system for all program groups in the Department, (6) assisting in the creation of an EH&S resource library, (7) developing an office file-keeping system to maintain official campus records and legal documents related to environmental health and safety, (8) assisting the Director in developing a successful strategy to solve space needs for the department, (9) managing personnel matters, the recharge program, accounting, purchasing, payroll, consultant agreements/service contracts, IOC processing, clerical and administrative support, and (10) developing support staff personnel. (Exhibit A, Epley Decl.)

The job description also discusses the following knowledge and skills required for the position: (1) excellent project management and analytical skills, (2) thorough knowledge of University fund accounting, statistics and common accounting practices, (3) familiarity with data processing, (4) future development of familiarity

with environmental, health, and safety legal requirements applicable to the campus, (5) excellent verbal and written communication and interpersonal relations skills, and (6) knowledge of organization behavior principles.[1] (Exhibit A, Epley Decl.)

Mr. Voytek's position was classified as a MAP I position, which is defined by UC policy as a management and leadership position, which requires at least 40 hours per week without compensation for additional hours. (Declaration of Jeffrey Blair, Exhibits B & C., ["Blair Decl."].) Mr. Voytek's starting salary was approximately $56,000 per year.

In Ms. Epley's declaration, she states that Mr. Voytek had difficulty from the beginning performing certain tasks such as managing the nine to eleven staff members under his supervision. It is not disputed that Mr. Voytek did not have management experience prior to accepting the Associate Director position, nor that he had difficulty performing all of his work as Associate Director.

It is the cause of his difficulty with his job performance that is apparently in dispute. (Epley Decl., ¶ 3). Both Mr. Voytek and Ms. Epley state that for some time they had weekly meetings and the frequency of the meetings decreased after September 1990. Ms. Epley states these were mentoring meetings; Mr. Voytek testifies that Ms. Epley criticized him constantly and was unwilling to explain her criticisms. (Voytek Depo., Vol. III, pp. 361-62). Mr. Voytek states that Ms. Epley criticized his ability to manage numerous times, the first which he could recall being in June, 1990. Id. at 395-96.

---

[1] The job description also states that many of the above tasks place a premium on originality.

Mr. Voytek testified that he had asked for help for his unit at least eight or nine times and the Ms. Epley denied each request. (Voytek Depo., Vol III pp. 391-92). Mr. Voytek states that Ms. Epley's explanation of her refusal to give him additional staffing was that he "didn't know how to manage so [he] wouldn't know what to do with it if [he] got it." Id. at 395.

Mr. Voytek also testifies that he felt unable to keep up the pace of his job as early as June, 1990 (Voytek Depo., Vol. III, p. 406) and that in July, 1990 he approached Ms. Epley to discuss his difficulty in keeping up with his work, his fatigue and his desire for a change in his responsibilities. (Voytek Depo., Vol. I, p. 75). Plaintiff testified that he needed to have his job restructured even if that required a downgrade. (Voytek Depo., Vol. I, p. 77).

However, throughout Mr. Voytek's deposition, he states that the cause of his difficulties with his work was that Ms. Epley failed to give him the agreed upon training in order for him to develop the necessary skills, that he was required to work excessive hours, and that he and Ms. Epley did not work well together. Mr. Voytek also states that in December, 1990 or January, 1991, Ms. Epley did transfer the computer support responsibilities to Paul Lavely, though Mr. Voytek states that he informed her he needed the help elsewhere. (Voytek Depo., Vol. III, p. 399.)

According to plaintiff, In February, 1991, he went to his internist Dr. Somkin due to his concerns that increasing stress and overwork threatened to bring on an episode of depression. (Voytek Decl., ¶ 6). It is undisputed that plaintiff did not inform anyone at EH&S or UC that he had suffered from a long term depressive disorder or that he was taking anti-depressants and seeing

a psychiatrist weekly to treat this condition.

On March 1, 1991, Dr. Somkin wrote a letter to Ms. Epley stating that he had diagnosed Mr. Voytek with a stress related disorder and had advised him no to return to work until March 18, 1991, and that he should reduce his workload upon returning. (Defendants' Exhibit D to Voytek's Depo.) Plaintiff returned to work on March 18, 1991 with the following restrictions: (1) he must be able to stop work if significant job fatigue occurs (permanent restriction); (2) no evening or weekend work (3 months); (3) he must avoid new responsibilities (3 months); and (4) he must avoid deadline pressure (6 weeks). (Exhibit C, Epley Decl.)

Mr. Voytek filed a worker's compensation claim for his two week leave, claiming stress related fatigue. (Defendants' Exhibit E to Voytek Depo.) At the request of UC's worker's compensation insurance carrier (Applied Risk Management), Dr. Melvin Lipsett, a board certified psychiatrist, examined Mr. Voytek in May of 1991 to determine whether he could return to his employment in EH&S. (Lipsett Decl. ¶ 2.) Dr. Lipsett diagnosed Mr. Voytek as having dysthymia, with anxiety.[2] (Lipsett Decl. ¶ 3.)

Dr. Lipsett was aware of Mr. Voytek's history of depression and his severe depressive episode in 1977, but did not believe that Mr. Voytek was currently depressed. He states:

> "It was my conclusion that his condition as of June 1991 represented an aggravation of an already

---

[2] Dysthymia is a mood disorder. Stedman's Medical Dictionary, 25th Edition.

existing long-term depressive vulnerability, which was temporarily aggravated by the stress relating to his EH&S job. I recommended ten sessions with Dr. Dennis Weiss, his treating psychotherapist at that time, as treatment for Voytek's temporary disability." (Lipsett Decl., ¶ 3.)[3]

In Dr. Lipsett's preliminary letter to Jeffrey Rogers at Applied Risk Management dated May 6, 1991, Dr. Lipsett states:

> "In my opinion Mr. Voytek is able to do the job that was originally presented to him and not the job that he had a hand in writing the job description for. It would also be my recommendation that if at all possible Mr. Voytek be moved to another department. He is willing to accept one level lower than his present level. He would like to stay within the university as he feels that it is a congenial work situation except for his current one." (Exhibit B, Lipsett Decl.)

In Dr. Lipsett's June 20, 1991 report, Dr. Lipsett stated that "It is clear from the records that Mr. Voytek is not able to perform the duties and responsibilities of his usual and customary job as described in the job description dated April 30, 1991." (Exhibit B, Lipsett Decl., p. 28.) Dr. Lipsett noted that he had originally been misled by Mr. Voytek's statement that his current job

---

[3] The Court notes that Mr. Voytek has been diagnosed as suffering from a mental impairment of Major Depression, recurrent type, presently in a state of remission. (Declaration of Stephen S. Schneider, M.D., ¶ 4.)

was not the same as the job description. Id. at p. 29.[4]

Dr. Lipsett's report states that Mr. Voytek's case was complicated; he is a highly intelligent individual and highly competitive. When Mr. Voytek had clearly defined assignments he was able to perform well, except for the difficulty of completing tasks on time. However, the responsibility of a manager was apparently too much for him. Id. at 26. Dr. Lipsett states is his discussion of Mr. Voytek's case:

> "The problem is that the more Mr. Voytek tries to fulfill the job, the less capable he seems to become of fulfilling the job requirements.... One problem here is that Mr. Voytek has little understanding of the reality of his position, and is somewhat naive about his impact on others. He seems to pull for having his work outlined for him, and being told what to do. He has gotten into a serious personality clash with Mr. Epley.... Mr. Voytek has a very vulnerable character structure. As was pointed out in one of the evaluations, he had a tendency to take on more of work than he could possibly deliver, and in trying to do that has worked himself into a state of exhaustion..." Id. at 27.

In conclusion, Dr. Lipsett states that in his opinion,

> "...it would be in everyone's interests for Mr. Voytek not to try to continue the job in which he is currently employed...Although at this point he is

---

[4] Mr. Voytek disputes the characterization of the job requirements in the April 30, 1991 job description, only to the extent that it included a requirement that he must work the number of hours needed to get the job done.

> denying that he is depressed, his psychological testing showed that he not only had fewer psychological resources that expected...but he also appeared to be experiencing a significant and most likely overwhelming number of stressors at the time of testing..." Id.

In Dr. Lipsett's deposition, he testified that his June 20, 1991, opinion that Mr. Voytek was unable to perform his usual and customary job was based upon a variety of factors. Dr. Lipsett testified that he did not evaluate each job function separately, but reviewed the job description dated April, 1991 as part of his evaluation. (Lipsett Depo. pp. 36-39.) He also testified that in this particular job, Mr. Voytek was unable to complete tasks on time due to his own overvaluation of his capabilities and his need to have approval from authority (Julia Epley). (Exhibit A to Katzenbach Decl., Lipsett Depo., pp. 35-36).

Moreover, Dr. Lipsett testified that in June of 1991, in his opinion, Mr. Voytek would have become depressed again if he returned to his job. However, he testified that it would be speculation to opine as to how long it would take to become depressed. Id. at 46. Dr. Lipsett further testified that there was not much that could be done (concerning the return to his job) given the "gradual deterioration" of Mr. Voytek's relationship with his supervisor. (Lipsett Depo. pp. 54-55.) He explained that the situation was unlikely to be repaired because of Mr. Voytek's character structure: "[t]he more he tried, the more errors he seemed to make, so that this led to more criticism, and so he kept feeling worse and worse." Id.

Based upon Dr. Lipsett's determination that plaintiff should not continue in his current position, Mr. Voytek has placed on pe manent disability on June 28, 1991.

Mr. Voytek's own testimony concerning his ability to perform in his job is as follows. First, he testifies that after his vacation in June, 1990,

> "...I was very, very concerned that I was headed towards serious problems for me and my family because I was working many, many more hours than we discussed. I asked if it was possible to restructure my job, to have fewer responsibilities. Julia's response to that was that yes, I had had a very, very difficult time for seven months,...but the worst was over and I didn't need to worry." (Voytek Depo., Vol I, p. 75.)

Mr. Voytek further testifies that after his return to work on March 18, 1991:

> "I was still interested in keeping a job at EHS, but as I indicated in July of 1990 and had indicated to her before I went on medical leave, we needed to restructure it. I didn't feel able at that point to continue my regular job." (Voytek Depo., Vol. I, p. 93).

Mr. Voytek's letters to Dr. Lipsett also evidence his state of mind during the time period after his initial medical leave but prior to his permanent disability leave. In a letter to Dr. Lipsett dated May 5, 1991, Mr. Voytek states that he is not depressed; he also states that "I believe that I could return and succeed in my current job <u>if it were the job I was offered</u> (e.g., work 9-10 hours per day, plus one Saturday a month) <u>and I was not subject to the five behaviors of my boss</u> that I outlined on 'Schematic of the Problem'..." (Exhibit C, Lipsett Decl.) Mr. Voytek states that he is not confident of these behaviors changing or of being able to return to the job he was originally offered. Also, he writes that his first job choice is to find

another job at the University at the same pay and at the same level or one level lower. Id.[5]

In a letter dated May 15, 1994, Mr. Voytek states "I am convinced I can no longer work with Julia Epley. I don't now believe I can healthfully return to my current job under any circumstances." (Exhibit F, Lipsett Decl.) He also writes that Julia Epley had circumscribed his responsibilities and contacts with others. Id. He states in his deposition that he requested additional work from Ms. Epley two or three times after his return from medical leave, and he was told that she was following his doctor's restrictions. (Voytek Depo., Vol. III, p. 494.) In a letter to Dr. Lipsett dated October 21, 1991, Mr. Voytek writes that his 'personal preference is not to return to EH&S at all, but not to be precluded from other UC jobs." (Exhibit F, Lipsett Decl.) Mr. Voytek also notes that he declined one job that was not right and had come in second for three others. Id.

Mr. Voytek testified that as of June 28, 1991, he could not do the job he had been doing on March 1, 1991; however, he could have done the "time constrained job: that he was hired to do with the training he was promised by Julia Epley. (Voytek Depo., Vol. III, p. 502.) He reiterates throughout his deposition as well as his correspondence with Dr. Lipsett and UC that as of June 28, 1991, he could have done the job he was hired to do but not the job which required more than 50 hours per week and one Saturday a month. Id., pp. 502-04. Mr.

---

[5] In a letter dated May 7, 1991 addressed to Dr. Lipsett, sent by Mr. Voytek to clarify his May 5 letter Mr. Voytek states that he is not confident that the job originally offered him--which he believed he could do--will ever exist again. (Exhibit F, Lipsett Decl.)

Voytek states that Julia Epley had informed him prior to his accepting the job that the position would require that he work approximately 50 hours per week and one Saturday per month. (Voytek Decl., ¶ 4.)

However, he also testifies that "unequivocally" he could not return to the EH&S job due to lack of any restriction on his hours and that he could not work with Julia Epley, not due to his medical condition but due to personality differences. (Voytek Depo., Vol. III, pp. 508-09.) He states: "unfortunately, Julia and I didn't work particularly well together." (Voytek Depo., Vol. III, p. 509.)

After Mr. Voytek went on permanent disability, he sought review under UC's personnel policies. (Voytek Decl. ¶ 14.) In a letter dated June 13, 1991 he wrote Daniel Boggan, the Vice Chancellor, Business and Administrative Services, requesting that an independent factfinder be appointed to review his allegations that his supervisor caused a stress injury that has resulted in his losing his job. (Exhibit A, Declaration of Daniel Boggan.) In his letter Mr. Voytek states he "will request transfer from my EH&S position to another University position of comparable salary and predominantly analytic responsibilities and whatever lost wages and legal fees result." Id.

Ross D. McKeen was appointed to review the situation and made a recommendation in October, 1991. The recommendation was adopted by Mr. Boggan. (Exhibit H, Voytek Decl.) In a letter to Mr. Voytek, Mr. Boggan states that he has considered Mr. McKeen's report concerning the issue of the alleged lack of support for training and development, the alleged lack of staff to complete assigned tasks, and the alleged failure to consider Mr. Voytek's disability when tasks were assigned

following Mr. Voytek's return from medical leave. Mr. Boggan adopted the report's findings that there was "no indication of systematic denial of training or unreasonable denial of staff given the context of the management situation. He [McKeen] indicates that actions with respect to reassignment were reflective of an effort to be responsive to your medical condition, and that no termination action has been taken, leaving any assessment of motivation to speculation." Id.

Mr. Voytek also states in his deposition and declaration that Ms. Epley and UC made no attempts "to accommodate him" in accord with UC policies. Defendants offered the following evidence as to UC's actions concerning Mr. Voytek's disability.

Prior to Mr. Voytek going on permanent disability, in June, 1991, Joe Bluford, and Assistant Director of Capital Budget, Budget and Financial Analysis at the University of California, San Francisco, contacted Mr. Voytek to find out if he was interested in the Senior Budget Analyst position. Mr. Voytek interviewed for the position on June 19, 1991, and Mr. Bluford told him that he would check on the lateral transfer, while Mr. Voytek considered whether he wanted to work for the Budget office. A few days later Mr. Voytek turned down the job, saying that he "did not need the stress." (Declaration of Joe Bluford, ¶ 6.)

Mr. Voytek states in his deposition that he negotiated to have the job classified as Principal Administrative Analyst and that Mr. Bluford was willing to do so if Mr. Voytek was willing to take sole responsibility for rebuilding the budget office. Mr. Voytek declined this offer because "the job was too much like the one I was leaving and whether it was a MAP 17 or a Administrative Analyst II, at that point it didn't matter. It was take this

dispirited group and revive it and I didn't have the energy to do that." (Voytek Depo., Vol. IV, p. 613-14.) Mr. Voytek testifies that he declined the Senior Analyst position for two reasons: "One, though I was in better shape in May than I was in March, I was still pretty exhausted, and any new job was going to be a tough hoe. So I didn't want to take it if it wasn't the right job. The second is that I've already experienced having to take some steps back in my career. I clearly understand that between now and the end of my work life I may have to do that again. But my preference, given that was only May [June], was not to do it then." (Voytek Depo., Vol. IV, p. 615.)

After going on permanent disability leave, in August, 1991 UC retained James Tassano, a vocational rehabilitation counselor located Oakland, California. (Declaration of James Tassano, ¶ 1.) Mr. Tassano worked with Mr. Voytek from August, 1991, until May, 1992. Id. Mr. Tassano states that he analyzed Mr. Voytek's job skills, reviewed his medical restrictions, and worked with Mr. Voytek to review duties of potential jobs both within and outside the University of California. Id. ¶ 2.

The Court has reviewed Mr. Tassano's progress reports concerning Mr. Voytek's job rehabilitation and notes that Mr. Tassano's reports reflect the following evaluation of Mr. Voytek: (1) Mr. Voytek needed a structured work environment but was afraid of being bored in a more routine position; (2) Mr. Voytek had difficulty recognizing that his desire for a high salary and prestigious position conflicted with this desire to control his hours and avoid managerial responsibilities; (3) Mr. Voytek's job counselor questioned the appropriateness of certain jobs because Mr. Voytek had failed to recognize that he was applying for positions that required skills such as managing employees; (4) Mr. Voytek had difficulty accepting

criticism in previous jobs; (5) he had difficulty planning; (6) he had difficulty getting bogged down in details and in delegating; (7) he had difficulty following directions; (8) he was confused about whether he wanted structured or unstructured work; (9) he has a need for constant praise which most supervisors will not provide; (10) he felt that Dr. Lipsett's restrictions were too severe but the counselor was only able to pursue jobs within these requirements; (11) He interviewed for numerous jobs the counselor did not feel fit the limitations recommended by Dr. Lipsett. (Exhibit A, Tassano Decl.)

The above are examples drawn from the detailed reports concerning Mr. Tassano's counseling sessions. Mr. Tassano notes throughout that Dr. Weiss, Mr. Voytek's treating psychiatrist was unwilling to comment on the appropriateness of any specific jobs that plaintiff was pursuing. At some time in early 1992, the plaintiff participated in a volunteer work assignment during which numerous job related issues arose such as prioritizing, stress headaches, falling behind in his work, general work readiness, and complexity of tasks. (Exhibit A, Tassano Decl., Letter from Tassano to Jerri Tenbrink, March 23, 1992.)

In response to plaintiff's concerns regarding his job restrictions, Mr. Tassano recommended that plaintiff see Dr. Lipsett again. However, plaintiff preferred to get a second opinion from Dr. Michael M. Gamble, who had been recommended by Dr. Weiss. Dr. Gamble examined Mr. Voytek in April, 1992 at the request of Mr. Voytek's rehabilitation counselor. (Gamble Decl. ¶ 2). After two examinations, Dr. Gamble's diagnosed Mr. Voytek as having

> "recurrent, major depression which was treated and not manifest at that time. Clinically, Voytek was

not depressed and there was no evidence of organic dysfunction; rather, Voytek's condition appeared to be characterological in nature. It was my conclusion that his condition was permanent and stationary and that he was able to return to work." (Gamble Decl. ¶ 3).

Dr. Gamble also states that he worked with Mr. Voytek's rehabilitation counselors to review potential jobs and determine whether they were within the scope of his medical restrictions. The restrictions included

> "that Voytek should not supervise more than a few people, if any, and that he should not work with his EH&S supervisor, Julia Epley. My opinion was that Voytek would not be suited to management-level positions which required his supervising other employees, or open-ended responsibilities. This included the Associate Director position at EH&S. My opinion was based on Voytek's characterological structure and limitations and not on any neurologically based mental disorder." Id. ¶ 4.

In attempting to characterize the nature of Mr. Voytek's injury or disability Dr. Gamble states in his final report of December 9, 1992 that:

> "Certainly Mr. Voytek has had a pre-existing depressive condition, pre-existing his working with the University of California. However, it appears from my reading of all the documents and in my interview with Mr. Voytek that the work situation, however it is viewed by the various parties, that developed at the University of California at Berkeley, under the supervision of Julia Epley 'lit up' his underlying personality problems which led

> to a vicious cycle of overwork, attempts to be overly perfectionistic with an underlying sense of failure and ultimately the development of depressive symptomatology. Absent that stimulus, one would not expect the Mr. Voytek would have developed the set of symptoms and behaviors that he did when he did in the natural course of the disorder. His type of depression appears to be quite greatly influenced by environmental stimuli, as a reaction to or a stimulus to dysfunctional personality traits that become inextricably linked with mood and probably become interlinked in a rather vicious cycle way with depression, one exacerbating the other in a rather circular fashion." (Exhibit A, Gamble Decl., p. 11.)

After a May 6, 1992 meeting with Mr. Tassano, Dr. Gamble and Mr. Voytek it was decided that Janette White [Shelton], an in-house rehabilitation counselor at UC, would be in a better position to evaluate UC positions to determine if they met Mr. Voytek's job criteria. Id.

Janette White Shelton states in her declaration that she worked with Mr. Voytek from March, 1991 through January, 1993 to assist Voytek in finding a job outside of his position at EH&S but at UC[6]. (Declaration of Janette White Shelton, ¶ 2.) Ms. Shelton worked under the following guidelines from Dr. Gamble: Mr. Voytek would do better with a male supervisor; he should not supervise too many people (1-2 are o.k.); and he needs clear directions and structure from his supervisor. (Exhibit A, Shelton Decl., p. 5 of May 26, 1992 Letter). Ms. Shelton's reports reflect similar impressions as Mr. Tassano's; for

---

[6] At the same time Marilyn Stollon a job developer was helping Mr. Voytek look for work off campus.

example, she states that Mr. Voytek was bending the medically imposed criteria to fit an interesting job and that he believed he was overqualified for lower level jobs.

The Court also notes that Ms. Shelton states that she explained to Mr. Voytek that MAP Policy section 80 and UC Implementing procedures for MAP 78 and 80 provided for special selection procedures only if the employee was vocationally and medically qualified for the position, and only with the consent of the department offering the position. (Id. ¶ 6; Exhibit B, Shelton Decl.) These policies state that a qualified MAP member who becomes handicapped and who has received vocational rehabilitation may be selected for a position without the requirement that the position be subject to recruitment. (Exhibit B, Shelton Decl., 80 Rehabilitation, MAP 78 & 80 Procedures.) Ms. Shelton's reports detail the job search and rehabilitation process through Mr. Voytek's obtaining his current job.

Mr. Voytek obtained his current job at the U.S. Department of Health and Human Services on October 5, 1992. Monitoring of Mr. Voytek primarily by Ms. Stollon continued through December, 1993. He is a Financial Operations Specialist, and his salary is roughly $55,000 per year. (Voytek Depo., Vol. I, pp. 113-14.)[7]

Lastly, the Court notes that plaintiff's expert Dr. Stephen S. Schneider examined plaintiff on October 4, 1993, and determined that he suffers from a mental impairment of Major Depression, recurrent type, in a state of remission at that time. (Schneider Decl., ¶ 3, 4). He

---

[7] Mr. Voytek's declaration states that his current salary is $54,557 per year and that his final salary at EH&S was $59,500. (Voytek Decl., ¶ 17.)

further stated that while Mr. Voytek is depressed he is severely limited from regular life activities. Id. ¶ 6. Dr. Schneider stated no opinion concerning Mr. Voytek's ability to function in a job when not in an episode of depression. He stated Mr. Voytek would in all probability need to undergo treatment for this disorder throughout his life. It is undisputed that Mr. Voytek has been hospitalized in the past for this condition, that he was seeing and continues to see a psychiatrist weekly, and was taking and continues to take anti-depressant medications for his condition. Id. ¶s 2, 8.

It is the significance of the above evidence that is the focus of parties' arguments at summary judgment.

III. Discussion

A. Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 provides:

> "No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance...." 29 U.S.C. § 794 (1985).

To obtain relief under section 504, a plaintiff must show "(1) that he is handicapped within the meaning of the act, (2) that he is 'otherwise qualified' for the services sought, (3) that he was excluded from the services sought 'solely by reason of his handicap,' and (4) that the program in question receives federal financial assistance." Dempsey v. Ladd, 840 F.2d 638, 640 (9th Cir. 1987); Smith

v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990).

In their motion for summary judgment, defendants contend that Mr. Voytek has failed to establish the second and third elements of the prima facie case. The Court finds that plaintiff was not otherwise qualified for position of Associate Director and therefore GRANTS defendants' motion for summary judgment. However, as a preliminary issue the Court addresses the evidence concerning the nature of plaintiff's alleged handicap.

1. What is the nature of plaintiff's handicap?

The Court notes at the outset that the difficulty in defining the precise nature of plaintiff's claimed handicap or disability impacts the analysis of whether plaintiff has met his burden of establishing that he was otherwise qualified to be an Associate Director, and that UC discharged him solely by reason of his handicap. Though defendants asserted in their opposition to plaintiff's motion for summary judgment that Mr. Voytek was not handicapped within the meaning of the Rehabilitation Act, defendants did not themselves move for summary judgment on that ground. Therefore, the Court assumes that plaintiff is handicapped within the meaning of the Rehabilitation Act.

However, the evidence concerning the nature of plaintiff's alleged disability if difficult to pin down. Dr. Lipsett and Dr. Gamble agree that Mr. Voytek suffered from recurrent episodes of depression; both doctors found that he was not depressed at the time they examined him. Both doctors diagnosed his condition as characterological in nature; both viewed Mr. Voytek as suffering from a pre-existing depressive condition that, together with his underlying personality problems, led to a vicious cycle of

overwork, attempts to be overly perfectionistic and ultimately the development of symptoms of depression. Both doctors opined that this condition as a whole made him unable to continue in his job at EH&S. In addition, both doctors had similar opinions concerning the appropriate restrictions on Mr. Voytek's job search, although Dr. Gamble's restrictions differed slightly from Dr. Lipsett's.

Furthermore, the Court notes that in Plaintiff's Motion for Partial Summary Judgment, plaintiff characterized plaintiff's handicap as his depressive disorder alone, not his depressive disorder in conjunction with other characterological traits. Plaintiff's expert Dr. Schneider diagnosed Mr. Voytek as suffering from Major Depression, recurrent type in October, 1993; however, he offered no opinion concerning the effect of the condition on plaintiff's job capabilities when he was not actually suffering from a serious episode of depression.

2. Was plaintiff "otherwise qualified" for the Associate Director position?

The focus of defendants' motion is that plaintiff as of June, 1991 was not "otherwise qualified" for the position as Associate Director at EH&S. Given the evidence before it on summary judgment, the Court agrees with defendants that plaintiff has not met his burden of showing that he was qualified in spite of his handicap. The Court also finds that there is no evidence from which a reasonable juror could find that UC did not reasonably accommodate Mr. Voytek's handicap.

a. Standard for "otherwise qualified" determination

Under § 504 plaintiff has the burden of

demonstrating he is otherwise qualified for the position in question. Reynolds v. Brock, 815 F.2d 571, 574 (9th Cir. 1987).[8] In the employment context, an otherwise qualified person is one who can perform the essential functions of the job in question. See School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 n. 17 (1987) (citing 45 C.F.R. § 84.3(k)). However, the parties do not agree as to the nature of the inquiry into whether plaintiff was "otherwise qualified."

Defendants contend that plaintiff must show that he was able to meet all of the job's requirements in spite of his handicap without consideration of accommodation, citing Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979) and Cook v. United States Dept. of Labor, 688 F.2d 669, 670-71 (9th Cir. 1982). Plaintiff on the other hand argues that UC had an affirmative duty to investigate and reasonably accommodate Mr. Voytek, citing Buckingham v. United States, 998 F.2d 735, 739-40. In the Court's opinion neither party has accurately characterized the relationship between the inquiry into whether plaintiff was "otherwise qualified" for the Associate Director position and whether reasonable accommodation was possible for his handicap.

First, the cases relied on by plaintiff that discuss an employer's affirmative duty to accommodate are cases which arise under § 501 of the Rehabilitation Act. See Mantolete v. Bolger, 767 F.2d 1416, 1421 (9th Cir. 1985);

---

[8] If he can establish both that he is otherwise qualified and that he was terminated because of the handicap then the burden shifts to defendant, who must demonstrate a legitimate non-discriminatory reason for the termination. Id.

Fuller v. Frank, 916 F.2d 558, 561-62 (9th Cir. 1990);[9] Buckingham, 998 F.2d at 739-41; 29 C.F.R § 1613.704 (Equal Employment Opportunity in the Federal Government; Reasonable Accommodation). As Mantolete v. Bolger notes, the definition of qualified handicapped individual under § 501 differs from definition under § 504 in the imposition of an explicit requirement that accommodation of the handicap be considered in determining a handicapped person's qualifications for federal employment. Mantolete, 767 F.2d at 1421; see also Southeastern, 442 U.S. at 410 (discussing the difference between the affirmative action obligation of the federal government under § 501, the encouragement to state agencies to adopt such programs, and the lack of any such requirement under § 504).

Second, the Court disagrees with defendants' contention that reasonable accommodation is not to be considered until plaintiff first demonstrates that he is otherwise qualified for the job.[10] Defendants argue that

---

[9] In Fuller, the Ninth Circuit assumed without discussion that the plaintiff, an alcoholic, was "qualified" under § 501 and upheld summary judgment on the ground that Postal Service reasonably accommodated plaintiff. Fuller, 916 F.2d at 561. The court acknowledged that reasonable accommodation was ordinarily a question of fact and an issue on which the federal employer bears the burden. Id. at 562 n.6.

[10] 45 C.F.R. § 84.12(a), promulgated under § 504 states:

> "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or

UC is entitled to rely on attributes of the handicap if its renders an employee incapable of performing the essential functions of his job. See Southeastern, 442 U.S. at 406. In the Court's opinion, the defendants' argument is accurate as far as it goes, but it does not end the inquiry into whether Mr. Voytek was "otherwise qualified."

In Southeastern v. Davis the Supreme Court rejected the lower court's holding that "otherwise qualified" includes those "who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap." Id. at 406[11] The Court stated that "[t]aken literally, this holding

---

> employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program."

Defendants argue that this regulation imposed no duty on UCB to accommodate since (1) UCB did not know of Mr. Voytek's handicap and (2) he was not "otherwise qualified" for the position. The Court notes that UC did know of Mr. Voytek's handicap once Dr. Lipsett sent his report to UC. Moreover, UC's second argument begs the question since the regulation itself does not clarify the relationship between the inquiry into Mr. Voytek's qualification for the position and UCB's duty to reasonably accommodate his handicap.

[11] In Southeastern, an applicant to the Nursing Program was denied admission due to her hearing disability which rendered her unable to understand speech even with a hearing aid except through lipreading. The Court reversed the Court of Appeals determination that she was "otherwise qualified" for the Nursing Program under § 504 of the Rehabilitation Act.

would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes in effect that a person need not meet legitimate physical requirements in order to be 'otherwise qualified.'" Id. The Court noted that the district court's reading of the act was closer to the plain meaning: "An otherwise qualified person is one who is able to meet all of a program's requirement in spite of his handicap." Id.

The Court continued on to discuss whether the particular physical limitation (the inability to hear) was a legitimate qualification of the Nursing Program. The Court also found that, although Southeastern had no affirmative action duty under § 504, in some situations, the continuation of past requirements might deprive handicapped persons of the opportunity to participate in a covered program. The Court noted that the line between a lawful refusal to extend affirmative action to handicapped individuals and discrimination is not always clear, but held that this was not an instance where refusal to accommodate the needs of handicapped person amounted to discrimination. Id. at 412-13.

The Supreme Court again addressed the relationship between the "otherwise qualified' inquiry and accommodation of a handicap in School Bd. of Nassau County v. Arline, 480 U.S. 273 (1986). The Court having held that Arline, a former elementary school teacher with tuberculosis, was handicapped within the meaning of § 504, remanded the case to the district court to determine whether she was "otherwise qualified" to be a school teacher. 480 U.S. at 289.

The Court relying on Southeastern explained:

> "When a handicapped person is not able to perform the essential functions of the job, the court

> must also consider whether any reasonable accommodation' by the employer would enable the handicapped person to perform those functions....Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee,...or requires a fundamental alteration in the nature of [the] program." Arline, 480 U.S. at 287 n.17.

Further, the Court stated that "[t]he next step in the 'otherwise qualified' inquiry is for the court to evaluate...whether the employer could reasonably accommodate the employee under the established standards for the inquiry." Id. at 288; see also, Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (once established that employee cannot perform essential functions of job, employer must make reasonable accommodations to enable her to do so).

The standards the Arline Court refers to are contained in 45 C.F.R. § 84.12(b) and (c). 45 C.F.R. § 84.12(b) states:

> "Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) **job restructuring, part-time or modified work schedules**, acquisition or modification of equipment or devices, the provision of readers or interpreters and other similar actions." Emphasis supplied.)

Though an employer is not required to find another job for an employee who is not qualified for the job he or she was doing, the employer cannot deny an employee alternative employment reasonably available under existing

policies. Arline, 480 U.S. at 289 n. 19.[12]

The Court agrees with defendants that if Mr. Voytek's handicap had rendered him completely incapable of performing his job such that reasonable accommodation was inherently not possible, the Court need not reach the issue of reasonable accommodation. See Cook, 688 F.2d at 670-71. Defendants are also correct in noting that the courts in August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) and Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987) did not reach the issue of reasonable accommodation; summary judgment was upheld based upon undisputed evidence that the plaintiff was completely disabled and admittedly unable to perform the essential functions of their jobs.[13] However,

---

[12] Moreover, § 84.12(c) explains that under subpart (a) the factors to be considered in order to determine whether an accommodation would impose an undue hardship on a recipient of federal funds are: (1) the size of the program with respect to the number of employees, the facilities, and the budget; (2) the type of the recipient's operation; (3) the nature and cost of the accommodation needed.

[13] In August the First Circuit did not even consider whether accommodations would have been reasonable since the plaintiff stated he was incapable of working by claiming total disability. The court noted that plaintiff had not disclaimed those statements, nor pointed to any "facts which could raise any issue as to whether he was totally disabled during the period in question." August, 981 F.2d at 583. Similarly, in Beauford, the school teacher suing under § 504 had been hospitalized due to various physical and emotional ailments related to pressures from the school. The Court held that she was not otherwise

the evidence concerning whether Mr. Voytek's depressive disorder or dysthymia inherently rendered him incapable of performing the position of Associate Director is disputed. Nor, as discussed below, has he admitted that accommodation in his position at EH&S was not possible.

Thus, the Court holds that the proper inquiry to determine whether Mr. Voytek is "otherwise qualified" for the position of Associate Director as of June, 1991 when he went on disability is first to consider whether he could perform the essential functions of his job in spite of his handicap. As a second stage to the inquiry, the Court must consider whether reasonable accommodation could have been made by UC in order to aid Mr. Voytek in performing these essential functions.

b. Could Mr. Voytek perform his job responsibilities despite his handicap?

Defendants argue that there is no disputed issue of material fact concerning plaintiff's inability to perform his job as of June, 1991. As the Court noted above, it is plaintiff's burden to show that he was capable of performing the essential functions of his job. See Arline, 480 U.S. 273, 287 N.17. Plaintiff first points to the fact

---

qualified because the plaintiff admitted that she could not perform the essential functions of the job and would be unable to do so in the future. Beauford, 831 F.2d at 771.

The Court notes that though Mr. Voytek did claim total disability on his worker's compensation form, he does disclaim the statement, and he does point to evidence that he was not totally disabled such as Dr. Lipsett's original opinion that plaintiff could return to the job that Mr. Voytek described as his original job.

that Mr. Voytek had been in the Associate Director position since December, 1989 and that Mr. Voytek's performance review dated January, 1991 rated him as "meets expectations." Plaintiff also argues that Mr. Voytek could perform the job of Associate Director that he was originally hired to do, but not the job that required excessive hours.

Again, as noted above, the difficulty in defining the precise nature of plaintiff's claimed handicap or disability impacts the analysis of whether plaintiff has met his burden of showing that he was otherwise qualified to be an Associate Director. Plaintiff asserts that his handicap is his depressive disorder and that because he was not depressed at the time, his handicap did not render him incapable of performing his job. Dr. Lipsett and Dr. Gamble agree that Mr. Voytek suffered from recurrent episodes of depression but that he was not depressed at the time they examined him. Both doctors diagnosed his condition as characterological in nature and found that his character structure in combination with his depressive disorder resulted in Mr. Voytek being unable to succeed in certain types of jobs.

Much of the difficulty with assessing the evidence in this case results from plaintiff's inherently conflicting arguments. Plaintiff argues on the one hand that his handicap was his depressive disorder, that Dr. Lipsett found that he was not depressed but would risk depression if he returned to work, that UC failed to accommodate this disorder, and that UC discharged him because of his depressive disorder. In making this argument, plaintiff claims that his "handicap" allowed him to remain at EH&S as long as he only was required to work 50 hours a week and that UC failed to reasonably accommodate this need; however, plaintiff has offered no evidence to show that his depressive disorder alone did in fact require that he only

work 50 hours a week and that UC fired him because of it. Plaintiff's only expert, Dr. Schneider, diagnosed Mr. Voytek as suffering from Major Depression, recurrent type, but offered no opinion concerning the effect of the condition of plaintiff's job capabilities when not suffering from depression. The only evidence in the record concerning plaintiff's job capabilities when suffering from a stress disorder that was linked to his depressive disorder due to plaintiff's character structure is that of Dr. Lipsett and Dr. Gamble.

On the other hand, plaintiff asserts that he could not continue in his position because he did not develop the hoped for managerial skills, and because of personality conflict with Ms. Epley that was unrelated to his depression. If in fact plaintiff were to succeed on this argument, the Court notes that defendants would be entitled to summary judgment since they have no duty to accommodate a lack of managerial skills or a personality conflict that are unrelated to plaintiff's alleged handicap. Moreover, if plaintiff could in fact not return to his position because of his lack of managerial ability and because of a personality conflict with his supervisor, and if Dr. Lipsett agreed with him, then he cannot argue that he was discharged because of his handicap.

The Court also notes that Mr. Voytek's differentiation between the job he was hired to do and the job he was doing in 1991 further complicates the analysis of the evidence on summary judgment. The Court finds that there is no evidence to support Mr. Voytek's assertion that the job requirements for the Associate Director position changed over the course of his tenure. To the contrary, Mr. Voytek, admits that the hoped for fit between himself and the job did not materialize. He also admits that he has workaholic tendencies. Moreover, both Dr. Gamble and Dr. Lipsett state that Mr. Voytek is

unsuited to manage employees, and to have open ended assignments, two aspects of his EH&S job explicitly mentioned in his original job description.

Furthermore, Mr. Voytek's insistence that he was promised by Ms. Epley that the job would require only 50 hours a week and one Saturday a month is immaterial. Regardless of Ms. Epley's estimation of the amount of time she expected Mr. Voytek would need to work in order to fulfill his responsibilities, this was no guarantee. Mr. Voytek knew he was being hired for a managerial level job. He helped draft the job description. The alleged fact that the position required more hours than either he or his supervisor expected does not transform the job into a "different job." Finally, the evidence as to Mr. Voytek's character structure (whether or not caused by his depression) undisputedly shows that Mr. Voytek's psychological problems caused him to have difficulty with completing tasks on time in an unstructured environment.

Finally, the fact that UC sent Dr. Lipsett a job description in April, 1991 which specified that the position required as many hours as necessary, does not alter the job Mr. Voytek was originally hired to do. The position he was hired for was a MAP I position which was designated as requiring at least 40 hours a week, with no compensation for work over that amount. There is no evidence that Mr. Voytek was unable to complete his work in less than what he considers "excessive hours" due to a change in the responsibilities he was given. To the contrary, it is undisputed that Ms. Epley removed at least one major responsibility from Mr. Voytek prior to his initial disability leave and that Mr. Voytek requested that she remove additional responsibilities and hire additional

staff.[14]

The Court concludes that the essential functions of Mr. Voytek's job were those listed in his original job description. The requirement that he work the hours needed to get the job done was implicit in the MAP I designation under UC policies. Whether or not Ms. Epley and Mr. Voytek both miscalculated when estimating the needed hours, or whether Mr. Voytek simply did not have the ability to accomplish all of his responsibilities in a reasonable work week is immaterial.

Thus, noting that the nature of plaintiff's handicap is unclear and that plaintiff's testimony that the job was not the job he was hired to do have no evidentiary basis, the Court addresses whether Mr. Voytek was qualified to remain in the Associate Director position at EH&S in spite of his handicap. The Court finds that he was not.

First, regardless of the nature of plaintiff's handicap, whether it was characterological in nature, an episode of his recurrent depressive disorder, or dysthymia with anxiety, plaintiff has presented no evidence that contradicts Dr. Lipsett's and Gamble's opinions that

---

[14] Other than the dispute over the hours required for the position, the only other difference that Mr. Voytek articulates is that he did not receive the expected training from Ms. Epley. Ms. Epley states in her declaration that she set aside numerous hours in Mr. Voytek's first year to personally "mentor" him. Mr. Voytek does not deny this; however, he generally states that he did not receive the training he was promised. Again the Court notes that whether or not Mr. Voytek was trained in a manner that met his expectations, the alleged lack of expected training does render the job a different job.

plaintiff should not return to his job, or his own statements that he could not continue in the position without having the job restructured. Plaintiff points out that Dr. Lipsett initially stated that plaintiff could return to the job "originally presented to him;" however, as the Court notes above, the distinction Mr. Voytek attempts to create between the two jobs is without evidentiary support.

Second, Mr. Voytek beginning in June, 1990 requested that the position be altered so that he would be capable of continuing in the position.[15] After his return in March, 1991, Mr. Voytek states that he wished to remain at EH&S but that he would need to have the job "restructured." The evidence discussed in the factual background section of this Order overwhelmingly shows that Mr. Voytek could not continue to perform all of the tasks assigned to him, both due his lack of managerial skills, the excessive hours that he was working, the ongoing conflict with his supervisor.[16] The evidence also overwhelmingly demonstrates that these restrictions were due to the combination of his depressive disorder, his character structure and the particular job situation at EH&S.

---

[15] The Court again notes that defendants had no reason to know that these requests were in any way related to a handicap until Mr. Voytek went on disability leave in March, 1991.

[16] Mr. Voytek's conflict with Ms. Epley began long before UC had any knowledge of Mr. Voytek's depressive disorder. After his return from leave, his relationship with Ms. Epley continued to deteriorate. Mr. Voytek states in his declaration that Ms. Epley told him to find a new job by April 30, 1991, a statement she denies. The Court addresses the significance of this alleged statement infra.

Based on the above evidence, the Court finds that plaintiff could not perform the essential tasks of his job, which included all of the responsibilities in his job description. Plaintiff offers no evidence that would create a triable issue of fact concerning whether plaintiff could perform the tasks of his job.

c. Could Mr. Voytek have remained in his position with reasonable accommodation?

The Court agrees with defendants that there is no evidence that plaintiff could have remained in his Associate Director job at EH&S with any sort of accommodation that would have been reasonable. Moreover, the Court finds that the accommodation provided by UC was reasonable as a matter of law.

In summary, UC's efforts at aiding Mr. Voytek were as follows: to follow Dr. Somkin's job restrictions, to follow Dr. Lipsett's recommendation concerning his ability to perform the EH&S job, to offer him another position prior to his permanent disability leave, and to provide rehabilitative counseling to aid him in finding his current job. Plaintiff, however, points to the following as evidence of UC's failure to reasonably accommodate him: (1) the denial of Mr. Voytek's repeated requests to have his responsibilities reduced, (2) the failure of UC to restructure his EH&S job, (3) UC's reliance on Dr. Lipsett's report as the reason for removing him from that job, and (4) Mr. Voytek's allegation that UC failed to accord him the benefits of existing policies to accommodate his handicap. The Court disagrees with plaintiff's characterization of the evidence before the Court.

"When a handicapped employee is not able to

perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions..." Arline, 480 U.S. at 287. Although employers "are not required to find another job for the employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies." Marsh v. Arline, 107 S. Ct. 1123, 1131 n.19 (1987).

The issue of whether an employer has provided "reasonable accommodation" is ordinarily a question of fact. Reynolds, 815 F.2d at 575. The employee must make at least a facial showing that accommodation is needed to allow them to perform essential job functions. See Buckingham, 998 F.2d at 740. The employer then must gather sufficient information from the applicant and qualified experts to determine what accommodations are necessary to enable the applicant to perform the job. Id. The Ninth Circuit has upheld the summary judgment based upon findings that employers have as a matter of law reasonably accommodated a handicapped individual. See Fuller, 916 F.2d at 560 (Post Office reasonably accommodated an alcoholic employee by repeatedly granting leave and recommending treatment); Lucero v. Hart, 915 F.2d 1367, 1372 (9th Cir. 1990) (county reasonably accommodated applicant by allowing her to retake test, driving her to the test, and making numerous offers to allow her to retake the test). [17]

---

[17] The Lucero court in upholding the district court despite the ambiguity of its opinion, explains that if the employee cannot be reasonably accommodated such that she could perform her job, then she is not "otherwise qualified;" however, even if the employee was considered

1. Denial of requests for reduction of responsibilities

First, UC was not required to accommodate Mr. Voytek until his impairment was known. 45 C.F.R. § 84.12(a). This renders his requests for a reduction in his responsibilities from June, 1990 through February, 1991, immaterial to the issue of accommodation, since it is undisputed that Mr. Voytek did not disclose his depressive disorder to UC.

2. Failure to restructure his position

Second, plaintiff's contention that UC failed to accommodate him by restructuring his position at EH&S is unsupported by the evidence. Defendants' evidence from Dr. Lipsett and Dr. Gamble, in addition to plaintiff's own statements, is that plaintiff should not continue to work at EH&S in the Associate Director position since plaintiff could not mentally/emotionally handle the stress of managing more than a few employees, could not have a job with open-ended assignments, and that he should not work with Julia Epley.

Plaintiff has provided no evidence to the contrary except general statements that he could do the job he was hired to do, or that he could do the job if it was limited to 50 hours a week and one Saturday a month. These statements are insufficient to create a triable issue of fact concerning whether Dr. Lipsett and Dr. Gamble were

---

to be "otherwise qualified" by the district court, the failure of reasonable accommodation to allow her to meet the minimum-job requirements, establish a nondiscriminatory reason for firing her. Id.

correct in their assessments. The evidence is overwhelming that plaintiff's character structure combined with his depressive disorder made him incapable of fulfilling the responsibilities in a position such as the Associate Director position at EH&S. The evidence is also shows that plaintiff continued to be unwilling to recognize this throughout his job search.

Though plaintiff states that he would have been capable of doing the 50 hour a week job, he also admits that he would have needed to have areas of responsibility transferred to other employees. Plaintiff's entire effort at rehabilitation was centered upon obtaining employment where he would not have open-ended assignments, would not be criticized by his supervisor, would have fixed hours, and a definite number of tasks. This is not a restructuring of plaintiff's job. It is a different job.

The transfer of areas of responsibility in order to permit Mr. Voytek to work a 50 hour work week is not reasonable accommodation because plaintiff would no longer be performing the essential functions of the Associate Director job as stated in his original job description. Moreover, the removal of Julia Epley as his supervisor would not be reasonable accommodation for plaintiff' inability to work with her as his supervisor.

The Court in Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985) explained that Southeastern did not require changes that would be substantial or would constitute fundamental alterations, as opposed to reasonable modifications. 469 U.S. at 300 n.20; see also, Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1383-84. Though what constitutes reasonable accommodation has been left to develop on a case by case basis, this Court finds that the evidence shows that no job restructuring short of giving plaintiff a different job at

EH&S would have enabled plaintiff to continue there, even assuming plaintiff could have continued to work under Ms. Epley. This type of job restructuring is a fundamental alteration of plaintiff's job, and is not required under the Rehabilitation Act.

The Court again notes that though Mr. Voytek disputes the legitimacy of the job description dated April 30, 1991 which specifically included requirements as to hours to be worked, his original job description encompassed this requirement since it was a MAP I position. Moreover, his objection does not at all address the fact that he admittedly did not have other essential skills required for the job, such as the ability to manage employees.

Plaintiff also argues that the unwillingness to restructure the EH&S position was due to his supervisor's hostility toward him. The Court disagrees. This is not a case like Reynolds v. Brock, which presented the issue as to the reason for the plaintiff's (an epileptic) discharge. The Ninth Circuit reversed the district court's grant of summary judgment due to two facts asserted by Reynolds: (1) that her supervisors were hostile to her after her handicap was discovered and (2) that the production requirements set for her during her ninety-day probation period were unrealistically high. Reynolds, 815 F.2d at 574. The court reasoned these issues were material because if true, they provided strong evidence that she was discharged because of her handicap. The court then noted that if defendants were unable to rebut the prima facie case with a legitimate non-discriminatory reason for her discharge (i.e. her low productivity) since Reynolds asserted that her supervisors set unrealistically high goals and impeded her attempts to achieve them. Id at 575.

The only evidence that UC reacted in a hostile

manner toward his "handicap" is plaintiff's testimony that Ms. Epley told him to find a job by April 30, and that after his leave in March, Ms. Epley had taken all his responsibilities from him and the situation at work was becoming intolerable. However, regardless of whether Ms. Epley initially said he should find a job by April 30, he was not required to do so. Moreover, plaintiff returned to work under his own doctor's restrictions which it is undisputed Ms. Epley complied with. Dr. Lipsett made the determination that plaintiff should not return to the Associate Director position, not Ms. Epley. Mr. Voytek himself states again and again that he and Ms. Epley had difficulty working together as of June, 1990 and that he could not return to EH&S because of their personality conflict, not because of his disability. Finally, Ms. Epley's alleged refusal to permanently reduce his responsibilities is not an allegation that she created new job responsibilities once his handicap was known.

Thus, unlike in Reynolds, Ms. Epley's alleged refusal to permanently alter the EH&S position and her alleged statement that he should find another job by April 30 are insufficient in the face of the remaining evidence to demonstrate that UC altered the requirements of Mr. Voytek's job due to hostility to his handicap and therefore failed to accommodate him. This is particularly true in light of the overwhelming evidence that Mr. Voytek's condition requires that he have a job drastically different from the EH&S job.

Finally, plaintiff asserts that the fact that EH&S restructured the department and distributed his responsibilities among several new positions is evidence that the failure to do so on his behalf was unreasonable. In response, the Court notes simply that UC was not obligated to offer plaintiff a new position. The elimination of his former position and redistribution of the tasks to

several employees is not a job restructuring; it is the creation of several new positions. Moreover, given both Dr. Lipsett's and Dr. Gamble's opinions that he should not work with Julia Epley, and plaintiff's own requests to be transferred to another UC position any position at EH&S was precluded.

3. Reliance on Dr. Lipsett's Report

Plaintiff also claims that UC did not fulfill its duty to reasonably accommodate plaintiff since if relied solely on Dr. Lipsett's report in determining that plaintiff could not be accommodated in his EH&S job. The Court agrees with plaintiff that UC had a duty to investigate whether accommodation was possible in his EH&S job. See Buckingham, 998 F.2d at 740 (employer has duty to gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary). However, the evidence in the record fully supports defendants' assertion that they fulfilled this duty.

UC complied with Mr. Voytek's work restrictions and worked with Dr. Lipsett to determine whether plaintiff could continue in the EH&S job. UC then relied on Dr. Lipsett's expert opinion that plaintiff should not. Though plaintiff continues to assert that Dr. Lipsett's work restrictions were not warranted, he points to no evidence that they were not. Plaintiff can point to no expert opinion that Drs. Gamble and Lipsett came to erroneous conclusions regarding plaintiff's character structure and interrelated depressive disorder. Nor can he point to evidence which suggests that the restrictions placed on him such as the requirement that he have a structured position, or manage only a few employees, were incorrect assessments of his medical/characterological condition.

Plaintiff's own statements in letters, to Dr. Lipsett, to Dr. Gamble, to his rehabilitation counselors, and in his deposition, indicate that plaintiff himself did not want to return to EH&S, primarily due to what he termed a personality conflict with Ms. Epley. The Court cannot find given plaintiff's desire to transfer from EH&S that UC was unreasonable in not further investigating whether plaintiff could be accommodated at EH&S.

4. Failure to follow UC policies

Finally plaintiff claims he was denied the benefit of UC's existing policies for handicapped MAP I employees. The Court agrees that the defendants must make available opportunities under existing policies. Arline, 480 U.S. at 289 n.19. Again, however, the Court finds that other than plaintiff's assertion, there is no evidence to support this allegation. The Court will not repeat in detail the rehabilitation process undergone by Mr. Voytek described supra, except to note that an independent investigator was appointed to look into Mr. Voytek's allegations of receiving improper training and improper staff support, and UC provided over a year of rehabilitative counseling pursuant to its policies. Mr. Voytek's assertion that UC was required under its policies to give him a preference for particular positions but failed to do so has no evidentiary support[18]

---

[18] It appears to the Court that Mr. Voytek's assertion is based on a misunderstanding of UC's policies and on the fact that Mr. Voytek applied for numerous UC positions which he was not offered. However, the declaration of Ms. Shelton and the policies in the record indicate that UC complied with the existing policies concerning MAP level employees.

5. UC reasonably accommodated plaintiff

The Court also finds that the offer of the UCSF job, at either a comparable level and salary as that of the EH&S position or with reduced responsibilities, is unrebutted evidence that defendants reasonably accommodated plaintiff. Plaintiff's testimony concerning his reasons for rejecting the offer are particularly enlightening: (1) he did not feel capable of performing the more demanding job, and (2) he did not wish to accept a downgrade at that time.[19]

In Guice-Mills v. Derwinski, 967 F.2d 794, 797-98 (2d Cir. 1992) the Second Circuit found that a head nurse's medical condition (depression, severe anxiety, insomnia and migraine headaches) which would require an alteration in the shift hours due to the need for drug therapy rendered her not otherwise qualified for the position since the shift beginning at 7:30 a.m. was found to be an essential requirement of the head nurse position. 967 F.2d at 797. The court also held that the hospital's offer of a staff nurse position to Guice-Mills with the requested hours and no reduction in remuneration was a reasonable accommodation as a matter of law. Id. at 798. Though UC was not required to offer plaintiff a different job, it did offer him both a comparable job, with comparable responsibilities, and a job that provided reduced responsibilities with a reduced salary, the precise accommodation that plaintiff now alleges UC should have provided at EH&S. The Court finds that this job offer was reasonable accommodation.

---

[19] This is additional evidence that plaintiff could not be accommodated to perform his EH&S job.

Therefore, for the reasons stated, the Court finds that plaintiff could not perform the functions of his position at EH&S with reasonable accommodation. The Court also finds that UC fulfilled its duty to accommodate by offering plaintiff the UCSF position as well as by providing the rehabilitation training available under its policies. Therefore, plaintiff cannot show that he was otherwise qualified for the position of Associate Director.

3. Was Mr. Voytek discharged solely due to his handicap?

Defendants also contend that they are entitled to summary judgment on the issue of whether Mr. Voytek was terminated solely because of his handicap. Defendants argue that they relied on Dr. Lipsett's opinion that plaintiff should not return to his job and should not work with Julia Epley; moreover, defendants point out that Mr. Voytek himself admits he could not work with Julia Epley. Thus, defendants claim that they discharged him due to his inability to work with his supervisor and therefore perform the Associate Director job, not because of his depressive disorder. Plaintiff on the other hand contends that UC admits that it relied solely on Dr. Lipsett's opinion, and that this opinion was based on Mr. Voytek's "handicap."

The Court only addresses this element to note plaintiff's conflicting arguments. If the Court had agreed with plaintiff above in its discussion of reasonable accommodation and held that the cause of his inability to work with his supervisor and work long hours were unrelated to his depressive disorder, defendants would be entitled to summary judgment on the ground that Mr. Voytek was not discharged solely by reason of what plaintiff claims to be his handicap. However, in refuting defendants' argument that UC did not rely solely on his

handicap in placing him in disability, plaintiff reverses his position and argues that Dr. Lipsett's opinion was based on plaintiff's depressive disorder.

The Court finds that both of plaintiff's arguments distort the evidence. First, the Court points out that plaintiff offered no evidence that Dr. Lipsett's opinion that plaintiff should not return to his position was incorrect. Second, the Court also notes that despite the imprecise nature of plaintiff's mental impairment, the evidence shows that Dr. Lipsett's opinion that it would be advisable for plaintiff not to return to his position at EH&S, is based upon a combination of plaintiff's admitted personality conflict with Julia Epley, the risk of plaintiff becoming depressed, and plaintiff's character structure. Dr. Lipsett diagnosed Mr. Voytek with dysthymia and stated that in his opinion he was not at the time depressed, through Dr. Lipsett feared that Mr. Voytek would suffer an episode of depression if he returned to EH&S. Dr. Lipsett also testifies that it would be pure speculation to advance an opinion as to when the depression would have recurred.

The Court finds that Dr. Lipsett's opinion cannot be characterized as relying solely on the evidence of plaintiff's depressive disorder or solely on the evidence of plaintiff's character structure. Dr. Lipsett, as well as Dr. Gamble, found the two to be interrelated. However, if the Court had agreed with plaintiff's arguments concerning the ability of defendants to reasonably accommodate plaintiff, and found that Dr. Lipsett's opinion was not based on plaintiff's depressive condition, the Court would then hold that plaintiff was not discharged solely due to his handicap.

If on the other hand the Court agrees with plaintiff's argument here that UC relied on plaintiff's depressive condition when placing him on disability, then plaintiff cannot argue that Dr. Lipsett's opinion was not

based on that condition.

As noted by the Lucero court in upholding the district court despite the ambiguity of its opinion, if the employee cannot be reasonably accommodated such that she could perform her job, then she is not "otherwise qualified"; however, even if the employee was considered to be "otherwise qualified" by the district court, the failure of reasonable accommodation to allow her to meet the minimum job requirements, establish a nondiscriminatory reason for firing her. Lucero v. Hart, 915 F.2d at 1372.

B. ADA Claim; Effective Date of the Act

Defendants also argue that plaintiff's claim under the Americans with Disabilities Act is barred since the effective date of the ADA was July 26, 1992 and the events giving rise to plaintiff's cause of action occurred before that date. Plaintiff argues that UC's continuing refusal to rehire plaintiff in his former position and UC's continuing refusal to accommodate him permit him are continuing violation of the ADA. The Court disagrees.

The date Mr. Voytek went on permanent disability was June 29, 1991. Plaintiff concedes that the ADA does not apply retroactively; however, he claims that the refusals to rehire him or reasonably accommodate him after July 26, 1992 are "continuing violations" of plaintiff's right to free from handicap discrimination. Plaintiff argues that he can establish a continuing violation by demonstrating an employer wide policy or practice that discriminates or based upon a series of related acts against a single individual. See Sosa v. Hiraoka, 920 F.2d 1451, 1455 (9th Cir. 1990).

The Court has been able to find no case which applies the continuing violations doctrine outside of the

context of tolling the statute of limitations on a claim. The Court agrees with defendants that plaintiff's cause of action accrued prior to the effective date of the ADA.[20]

IT IS SO ORDERED.

Dated: August 25, 1994

(s)
EUGENE F. LYNCH
United States District Judge

---

[20] Moreover, the Court notes that the parties agree that the elements of the ADA are identical to those of the § 504 and therefore even if his cause of action is not barred, the Court would grant summary judgment on this claim as well.

PRINTERS NOTE:

PAGE LEFT BLANK
FOR PURPOSE OF PAGINATION

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH J. VOYTEK,	)	No. 94-16673
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	D.C. No. CV-92-
	)	03465-EFL
UNIVERSITY OF	)	
CALIFORNIA; BOARD	)	ORDER
OF REGENTS OF	)	
UNIVERSITY OF	)	
CALIFORNIA,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States
District Court for the Northern
District of California
Eugene F. Lynch, District Judge,
Presiding

Argued and Submitted
January 9, 1996
San Francisco, California

Before: LAY,* CHOY and PREGERSON,
Circuit Judges.

---

* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

This action was brought by Joseph Voytek against the University of California and the Regents of the University of California under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 et. seq., alleging employment discrimination due to Voytek's mental disability.

The defendants filed a motion for summary judgment on two grounds: (1) that the ADA claim is barred because Voytek's claim arose before the effective date of the ADA, July 26, 1992; and (2) that the plaintiff has failed to establish a prima facie case under Section 504 of the Rehabilitation Act. The district court, the Honorable Eugene F. Lynch, presiding, granted summary judgment as to both claims. We affirm.

We need only to address whether the district court was correct in granting summary judgment on the basis Voytek has not established a prima facie case of disability discrimination. It is conceded the elements of the ADA are identical to the requirements of proof under section 504 of the Rehabilitation Act. The district court found it was undisputed that Voytek was not "otherwise qualified" for his position as associate director for program planning and resources in the Department of Environmental Health and Safety. The district court also found it was undisputed that the plaintiff was not discharged solely by reason of what the plaintiff claims to be his handicap but because of his inability to work with his supervisor.

The fundamental issue is whether the University afforded reasonable accommodations to Voytek because he could not carry out his duties as associate director due to his inability to handle the stress of a management-level position. The district court found the University fulfilled its duty to accommodate the plaintiff by offering him a

comparable position, with comparable but reduced responsibilities at a reduced salary, and by providing the rehabilitation training available under the University's policies. The plaintiff also did not introduce specific facts about the requirements of any other positions, or about his qualifications for those positions. The court found that under the circumstances of this case, the University's rehabilitation counseling reasonably accommodated Voytek as a matter of law.

Upon review of the overall record of the district court's detailed opinion, we affirm the district court's grant of summary judgment for the defendants.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH J. VOYTEK,	)	No. 94-16673
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
UNIVERSITY OF CALIFORNIA; BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA,	)	ORDER
	)	
Defendants-Appellees.	)	

Before: LAY,* CHOY and PREGERSON,
Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and suggestion for rehearing en banc is rejected.

---

* Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

JAMES E. HOLST, #345654
CHRISTINE HELWICK, #57274
JEFFREY A. BLAIR, #111327
University of California
300 Lakeside Drive, 7th Floor
Oakland, California 94612-3565
Telephone: (510) 987-9800

Michael T. Lucey, #099927
Greta W. Summerville, #121100
GORDON & REES
Embarcadero Center West, 20th Floor
275 Battery Street
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Defendant THE REGENTS
OF THE UNIVERSITY OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

JOSEPH J. VOYTEK, Plaintiff, v. UNIVERSITY OF CALIFORNIA; BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA, Defendants.	) Case No.) C92 3465 EFL)) DECLARATION OF) MELVIN LIPSETT IN) SUPPORT OF) DEFENDANTS' MOTION) FOR SUMMARY) JUDGMENT))))

Date: April 22, 1994
Time: 10:45 a.m.
Place: Courtroom D
Trial Date: October 24, 1994

I, MELVIN LIPSETT, declare:

1. I am a licensed medical doctor (license #A11253), with board certification in psychiatry. I received my M.D. degree at Creighton Medical School in Omaha, Nebraska in 1944, and, from 1944-1945, received postgraduate training at the Hospital for Joint Disease in New York, New York. In 1952, I completed a psychiatric residency at the Neuropsychiatric Institute at the University of Michigan, Ann Arbor, Michigan. From 1952 to the present, I have been in private practice in Oakland and Berkeley, California and have served as an instructor and staff consultant in psychiatry at various hospitals, universities and state departments. The facts stated herein are based upon my personal knowledge, and I could and would testify competently hereto if called upon to do so.

2. In May 1991, Applied Risk Management ("ARM"), the University of California at Berkeley's ("UCB") worker's compensation insurance carrier, requested that I examine and evaluate Joseph Voytek ("Voytek"), in connection with an alleged on-the-job injury in the UCB Department of Environmental Health and Safety ("EH&S") to determine whether he could return to his usual and customary employment in EH&S, as well as whether the injury Voytek sustained arose out of or in the course of his employment at UCB.

3. On May 3, 1991, I examined Mr. Voytek in my office. As a result of that examination, as well as my review of Voytek's medical records provided to me by ARM, I made written findings regarding Voytek's

condition, which are set forth in my June 20, 1991 report to ARM. A true and correct copy of this report is attached as Exhibit A hereto and incorporated herein by reference. My diagnosis of Voytek ws dysthymia, with anxiety. There was no chemical or neurological basis for his condition, rather it was characterological in nature. I was aware that Voytek was diagnosed for a severe depressive episode in 1977, but did not believe that this was an accurate diagnosis for his condition in 1991. It was my conclusion that his condition as of June 1991 represented an aggravation of an already existing long-term depressive vulnerability, which was temporarily aggravated by the stress relating to his EH&S job. I recommended ten sessions with Dr. Dennis Weiss, his treating psychotherapist at that time, as treatment for Voytek's temporary partial disability.

4. In my May 3, 1991 psychiatric evaluation of Voytek, initially reported to ARM in my May 6, 1991 letter to Jeffrey Rogers (a true and correct copy of which is attached as Exhibit B hereto), as well as in a May 5, 1991 letter from Voytek to me (a true and correct copy of which is attached as Exhibit C hereto), Voytek did not admit that he was depressed. In fact, he clearly told me that he was not depressed. In my opinion, Voytek was not depressed at this time.

5. In my opinion, as expressed in Exhibit B hereto, Voytek was employable in some capacity; however, the stresses involved in managing other employees was not advisable. In addition, as stated in my November 3, 1991 supplemental report to ARM (a true and correct copy of which is attached as Exhibit D hereto), Voytek could work at EH&S provided he was not in contact with his supervisor, Director Julia Epley and provided that he had a very structured environment in which he received clear directions as to the expectations of the job and careful

supervision. I also advised that Voytek should not be asked to make far-sweeping decisions on his own. When I learned in March 1992, that there were no positions in EH&S in which Voytek would not have some level of contact with Director Epley, I stated that Voytek could not return to work in EH&S at all. (See Exhibit E hereto, which is a true and correct copy of my March 23, 1992 letter to ARM).

6. Part of my opinion that Voytek should not work with his supervisor was based on the fact that Voytek himself told me several times that he was convinced that he could not work with Ms. Epley under any circumstances. In fact, Voytek wrote me several times to underscore this point. Attached as Exhibit F hereto are true and correct copies of letters dated October 21, 1991, May 7, 1991, May 15, 1991, and June 10, 1991, all four of which I received from Mr. Voytek on or about their noted dates.

7. My opinion that Voytek was disabled under the Workers' Compensation system had nothing to do with Mr. Voytek's prior history of major depression, although I certainly became aware when I examined him that he had suffered episodes of major depression in the past. My diagnosis, recommendation and opinion was that Mr. Voytek could not return to his usual and customary job as Assistant Director of Environmental Health and Safety only because his vulnerable character structure made him particularly susceptible to on-the-job stress of the high pressure, management level position he held and of the work that was required of him in that position. Based on my examination of Mr. Voytek and his psychological assessment test results, I was not at all surprised that Mr. Voytek described these personality clashes with his supervisor; nor was I surprised when Mr. Voytek told me

he was convinced he could not work with Ms. Epley any longer.

8. My opinion in June of 1991, which I continue to hold today, is that Mr. Voytek was emotionally stressed because he was failing in a management-level job which he was simply not emotionally qualified to handle or succeed in. It was the stress caused by Mr. Voytek's inability to succeed at his job at EH&S that caused me to conclude he would not be able to return to work there. The fact that Mr. Voytek had suffered major depression in the past had nothing to do with my opinions as expressed in any report that I made in conjunction with his case.

9. I read the declaration of Stephen S. Schneider, M.D. in support of Mr. Voytek's motion for summary judgment in this lawsuit and reviewed my June 20, 1991 report (Exhibit A hereto). Dr. Schneider opines that Mr. Voytek suffered from a mental impairment with a diagnosis of Major Depression, Recurrent Type, presently in a state of remission. Dr. Schneider adds that Major Depression is a chronic psychiatric illness which, unfortunately, has no cure and tends to wax and wain over the years. During these times, there are accompanying episodes of major dysfunction. Dr. Schneider reports further that Mr. Voytek has an extensive record of impairment resulting from this condition. I do not disagree with Dr. Schneider that Mr. Voytek has been subject to depressive episodes throughout his life. However, I think it is rather ingenuous to indicate that Mr. Voytek has a mental impairment based on the diagnosis of Major Depression, Recurrent Type. I disagree with Dr. Schneider on that point.

10. In reviewing my own records, it is clear that Mr. Voytek's depressive episodes have been brought about

by his failure to achieve what he was aiming for - approval from higher authorities by being able to meet his own perfectionist standards. What Dr. Schneider leaves out is the factor of Mr. Voytek's character structure which I have discussed in more detail in my report. Mr. Voytek tries to please but, as he over-extends himself, he has an unrealistic view of what he can do, as well as an unrealistic time frame for completion. Instead, he gets more and more desperate and, finally, becomes depressed. In my mind this does not constitute a disability.

11. As I understand it, once Mr. Voytek was able to recognize some of his characteristic problems in confronting issues and being able to look at them realistically, he has been able to function more appropriately in a non-management level position. It was Mr. Voytek's characteristic way of trying to function on the job that lead him into difficulties and, hence, the depressions. His supervisor, Ms. Epley, tried to accommodate his idiosyncratic behavior as much as possible. As he was less and less able to please her, the more non-productive time he put in which led to his decompensation. Mr. Voytek is an intelligent man, but this character structure gets in his way. In my opinion, this is not a disability. It is simply Mr. Voytek's personality.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was executed this 16 day of March, 1994 in Berkeley, California.

(s)_____
Melvin Lipsett, M.D.

JAMES E. HOLST, #345654
CHRISTINE HELWICK, #57274
JEFFREY A. BLAIR, #111327
University of California
300 Lakeside Drive, 7th Floor
Oakland, California 94612-3565
Telephone: (510) 987-9800

Michael T. Lucey, #099927
Greta W. Summerville, #121100
GORDON & REES
Embarcadero Center West, 20th Floor
275 Battery Street
San Francisco, California 94111
Telephone: (415) 986-5900

Attorneys for Defendant THE REGENTS
OF THE UNIVERSITY OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

JOSEPH J. VOYTEK, Plaintiff, v. UNIVERSITY OF CALIFORNIA; BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA, Defendants.	) Case No.) C92 3465 EFL)) DECLARATION OF) MICHAEL M. GAMBLE) IN SUPPORT OF) DEFENDANT'S MOTION) FOR SUMMARY) JUDGMENT))))

Date: March 4, 1994
Time: 10:45 a.m.
Place: Courtroom D
Trial Date: None

I, MICHAEL M. GAMBLE, declare:

1. I am a licensed medical doctor (license #C34623), with board certification in psychiatry. I received my M.D. degree at Tulane Medical School in New Orleans, Louisiana, in 1969. From 1969 through 1972, I had a general rotating internship at the U.S. Public Health Service Hospital in New Orleans, Louisiana. In 1975, I completed a psychiatric residency at Herrick Hospital in Berkeley, California. From 1975 to the present, I have been in private practice in Berkeley, California and am a staff physician at Alta Bates/Herrick Hospital. In conjunction with my private practice, I perform workers' compensation evaluations. The facts stated herein are based upon my personal knowledge, and I could and would testify competently hereto if called upon to do so.

2. In March, 1992, James Tassano, ("Tassano"), a vocational rehabilitation counselor working with Joseph Voytek ("Voytek") contacted me and asked that I evaluate Voytek and make a recommendation regarding this work readiness and complexity in work tasks. Voytek's vocational rehabilitation work was in connection with an alleged on-the-job injury in the University of California, Berkeley ("UCB") Department of Environmental Health and Safety ("EH&S").

3. On April 8, 1992, I first examined Mr. Voytek in my office. On August 22, 1992, I performed a psychiatric re-evaluation of Voytek in my office. A true

and correct copy of my December 9, 1992 report of this re-evaluation is attached as Exhibit A hereto. At the time of my August 22, 1992 evaluation of Mr. Voytek, my diagnosis was one of recurrent, major depression, which was treated and not manifest at that time. Clinically, Voytek was not depressed, and there was no evidence of organic dysfunction; rather, Voytek's condition appeared to be characterological in nature. It was my conclusion that his condition was permanent and stationary and that he was able to return to work.

4. From April, 1992, through September, 1992, I worked with Voytek and his rehabilitation counselors to review potential jobs and determine whether they were within the scope of Voytek's medical restrictions. These restrictions included that Voytek should not supervise more than a few people, if any, and that he should not work with his EH&S supervisor, Julia Epley. My opinion was that Voytek would not be suited to management-level positions, which required his supervising other employees, or open-ended responsibilities. This included the Associate Director position at EH&S. My opinion was based on Voytek's characterological structure and limitations and not on any neurologically based mental disorder. Voytek's vocational rehabilitation was difficult and a complicating factor was Voytek's inability himself to perceive and his unwillingness to accept some of the limitations placed upon him for his psychological well-being.

5. In connection with his claim for disability benefits from Prudential, Voytek requested that I complete an "Attending Physician's Statement of Disability" form and forward that form to Prudential, which I did. To assist me in completing the form, Mr. Voytek sent me a memorandum dated May 27, 1992 and entitled: "Information to Help You Complete the

Attached Prudential Physician Statement of Disability," and a copy of the form. A true and correct copy of this memorandum and the form is attached as Exhibit B hereto. In the May 27, 1992 memorandum to me, Voytek provided information about his health which he wanted me to use to accurately complete the form. I relied on that information in completing the disability form on Mr. Voytek's behalf.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was executed this 19th day of January, 1994 in Berkeley, California.

(s)_____
Michael M. Gamble

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ALEXANDRIA

JOSEPH J. VOYTEK,	)
	)
Plaintiff,	)
	)
vs.	)No. C92 3465 EFL
	)
THE UNIVERSITY OF CALIFORNIA, AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)
	)
Defendants.	)

DEPOSITION OF MELVIN M. LIPSETT, M.D.

FRIDAY, AUGUST 20, 1993

Reported by:

THOMAS C. BRENNEMAN, CSR NO. 9554

CHAMBERLIN & ASSOCIATES

Certified Shorthand Reporters

Two Embarcadero Center, Suite 1750

San Francisco, CA 94111

(415) 922-7787

* * *

BY MR. KATZENBACH:

Q. What I guess I'm trying to get to, do you recall making a medical determination that he was unable to perform any job that required him to delegate tasks?

A. No. I wouldn't say he was unable to.

Q. All right.

A. I said he found it difficult.

* * *

Q. Let me ask you this, in rendering your opinion that you did that's in Exhibit 4, did you make a determination that Mr. Voytek had a psychiatric condition that prevented him from gaining management skills?

A. No.

Q. All right. To the issue of financial management on the job description, what about financial management did you make your determination? What about Mr. Voytek's financial management duties did you determine Mr. Voytek was unable to perform?

A. According to his report and the other reports that I reviewed, he had a great deal of difficulty with being able to complete a report on time, I should say in a timely fashion.

Q. Any other material, any other issues, any other inability to do the job function associated with financial management?

A. Well, the problem is that his difficulties with assessing something that he had to do and have an allotment of an appropriate time seemed to be very difficult for him because he overestimated his capabilities in being able to complete the task in a timely fashion, and this applied to some of the other things he was supposed to do. I didn't go over the job description and take each specific one.

* * *

Q. Now based on Mr. Voytek's psychiatric condition, did you think it was impossible for him to complete tasks on time?

A. I wouldn't use the word "impossible."

Q. Do you think that the majority of instances he could not complete tasks on time?

A. In this particular circumstance, of this particular job.

Q. What about this particular job made it difficult for him to produce tasks on time, complete tasks on time

A. Part of it was Mr. Voytek's own overevaluation of his capabilities. Another part was his need to have approval from the authority, in this case, what's her name, Julia Epley, and when he wasn't getting that, this was disturbing to him and made it more difficult for him to complete the tasks. As I recall, he put in more

and more hours. The more he tried to do it, the more errors he seemed to make, which then called for comments by Ms. Epley, and this was more disturbing to him.

Q. Did you see any solution to this problem?

MR. BLAIR: Hang on a second. There's no foundation. It calls for speculation.

MR. KATZENBACH: I'll ask it a different way.

Q. Was Mr. Voytek, in the medical opinion you rendered, unable to handle the type of financial work he was being asked to do?

A. No, not to my knowledge. If I recall, he had been able to do that elsewhere.

* * *

Q. In connection with your determination that Mr. Voytek was not able to perform the duties and responsibilities of his usual and customary job as described in the job description dated April 30th, 1991, did you review the section entitled "Financial Management" of this job description?

A. I looked at the job description. I did not, as I said earlier, go into each of these essential functions with him but just was evaluating him at the time that I saw him whether he could function on the job given his report and given the various other medical and other reports.

Q. All right. so that --

A. So I didn't take each one of these issues and ask him whether he could do this, that or the other one.

* * *

Q. So you reached an opinion he could not perform the job?

A. Right.

Q. At that time did you reach any opinion as to what the medical consequences to Mr. Voytek would be should he return to his job, his existing job?

A. My opinion was that he would become depressed again.

Q. All right. Did you have any medical opinion at the time as of June 20, 1991, as to how long it would take for him to become depressed again?

A. If he went back to his job?

Q. Yeah.

A. It would only be speculation.

Q. Would it be accurate to say that your medical opinion as of June 20, 1991, was that because of Mr. Voytek's condition he had a higher risk of another depression episode if he returned to his existing job?

A. Yes.

* * *

Q. In your medical opinion you rendered on June 20, 1991, indicates he's unable to perform his normal job. If he were to go back to his normal job, was it your medical opinion that he would suffer an immediate industrial injury?

MR. BLAIR: Objection. When you say if he were to return to work, you're creating a hypothetical which asks him to make an opinion, and it's not necessarily expressed in this report, and when you try and do that, you're getting into the expert testimony area, and I'm going to instruct him not to answer.

MR. KATZENBACH: I simply want to clarify what it means when you say he can't perform his normal job. The problem here, sir, is that we are dealing with a psychiatric condition. Sometimes it's fairly easy. If a guy has lot his arm, his chances of being a right-handed baseball pitcher are drastically diminished, and the moment you're going to know that is in the first inning of the ball game. The question here with a psychiatric disability, and you're saying someone is psychiatrically unable to do a job, there's difficulty in assessing what that means if he were to go back, and I'm just trying to clarify, through the doctor's testimony, what it meant when he said he could not return to his job, he could not perform his job functions, what it meant psychiatrically for Mr. Voytek, and if it meant if there were a consequence, when that consequence would arise to the best that the doctor determined as of June 20th, 1991.

MR. BLAIR: For the record, the witness has already answered the question. The first is that he would likely become depressed. The second question is when, and he said that would be speculation. He doesn't know.

BY MR. KATZENBACH:

Q. All right. Is that correct?

A. That's correct.

* * *

Q. Is the fact that it was difficult for him to work with Ms. Epley, in your opinion, did that make it impossible for him to work with Ms. Epley?

A. No.

* * *

Q. Was that opinion you were intending to convey the opinion Mr. Voytek was at a greater risk of having another incident of depression should he continue to work with Ms. Epley?

A. Yes.

* * *

Q. I take if from your testimony that you consider that it was possible that Mr. Voytek would suffer further depressive incidents?

MR. BLAIR: If what? Just going to vacuum?

MR. KATZENBACH: If the matter was left untreated, if he returned to work for Ms. Epley.

THE WITNESS: I wouldn't say would, could.

Q. Was it possible?

A. Possible.

CHRISTOPHER W. KATZENBACH
KERRY R. STOEBNER
KATZENBACH AND KHTIKIAN
Attorneys at Law
1714 Stockton Street, Suite 300
San Francisco, CA 94133-2930
Telephone: 415 834-1778

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

JOSEPH J. VOYTEK,	)
	)
Plaintiff,	)
	)
vs.	)No. C92 3465 EFL
	)
THE UNIVERSITY OF CALIFORNIA, AND THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)
	)
Defendants.	)

DECLARATION OF JOSEPH J. VOYTEK IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Date:
Time: 10:45 A.M.
Courtroom D, 15th Floor

I, JOSEPH J. VOYTEK, declare under penalty of perjury:

1. I am the plaintiff in this action and I am giving this declaration in support of a motion for partial summary judgment. By education and training, I am a financial and budget analyst, and am familiar with how to calculate and project financial information and data. I have calculated my wage and other losses, indicated below, using standard methodology of which I am familiar.

2. I suffer from a long-standing condition which has been diagnosed as Major Depression. I have had several incidents of hospitalization because of episodes of depression, most recently in April 1989 while I was employed by the University of California ("UC"). I was also admitted to the intensive care unit at Alta-Bates Hospital on November 16, 1989, a few weeks prior to beginning the Associate Director job, because of a hypertensive crisis related to use of Nardil, one of the medications I take to control depression. During the time I was employed at UC, and continuing to date, I have seen a psychiatrist weekly for this condition and I take various anti-depression medications, including lithium carbonate and Nardil.

3. The effect of my condition is that, when I become depressed, I am unable to function normally at home or at work. For instance, I will lose concentration and find myself unable to complete even simple tasks, such as fixing dinner. I will sit for hours doing nothing and, when I go to bed, I will be unable to sleep. I often will spend the day in bed, unable to get up. I am unable to socialize with my wife or children, and am unable to interact with them, or even respond to them if they speak to me. As stated above, on occasion I have been hospitalized for depression when it got to the point where I felt I could not care for myself at all.

4. I began working as an Associate Director, Program Planning and Resources ("PPR") at the Office of Environmental Health and Safety ("EH&S") in December 1989. Julia Epley was the Director of EH&S and my supervisor. At the time I was hired, Epley and I discussed the projected workload for the Associate Director, PPR and Epley stated that the job would entail working no more than 50 hours per week and one Saturday per month. Additionally, when I advised Epley I lacked management skills, she encouraged me to take the job and assured me that I would be given training and support in learning a management role supervising employees in the department.

5. Initially things went very well and Epley expressed her satisfaction with my performance and work output. Beginning in July 1990, after about seven months on the job, I asked Epley to reduce the scope of my job and began advising her of the need to hire additional staff because of the increasing workload at EH&S and my own excessive work hours. I showed how this could be done within the authorized budget of EH&S. Epley rejected my suggestions. As a result, I continued to work excessive hours, and I believe I was visibly becoming burnt out. I noted this excessive workload and burn out in several memoranda to Epley in early 1991. On March 4, 1991, Epley gave me a draft performance appraisal (dated January 21, 1991) which noted areas which she felt I should work on improving during the following year and rated me overall as "meets expectations". An accurate copy of that appraisal is attached to this declaration as Exhibit A.

6. On March 4, 1991, I went to my personal physician because I felt the increasing stress and overwork threatened to bring on an episode of depression. My physician put me on an immediate two weeks of medical

leave. I returned to work on March 18, under certain temporary restrictions for the next six weeks and three months and the permanent restriction that I "must be able to stop work if significant fatigue occurs." An accurate copy of these restrictions are attached to this declaration as Exhibit B.

7. After going out on this temporary medical leave and upon returning to work, Epley and I discussed my work restrictions and my future at EH&S. I again proposed reducing the scope of the job to make it manageable or transferring me to another UC position. Among other things, I suggested a transfer to a position of Budget Officer/Principal Administrative Analyst in another UC office. That office had requested that I apply for this position and no person had yet been hired for the job. I asked to be allowed to apply, notwithstanding that the closing date had passed while I was at home on the two week medical leave of absence recommended by my doctor. Neither Epley no Philip Encinio, Epley's superior, took any action on this request.

8. My discussions with Epley went nowhere. Without addressing or discussing the specifics of potential job changes or accommodations, Epley said that no changes in the job were possible. Initially, Epley said that I had until April 30 to find a new position.

9. My subsequent efforts to resolve this situation were equally unsuccessful because UC would not discuss either how I could have the job at EH&S restructured to overcome the overwork and stress-inducing situation that Epley had allowed to develop, or how I could be transferred to another campus position. Epley refused to consider any accommodation of my disability within EH&S, including any restructuring of the Associate Director position. In preparing a job analysis for the

Associate Director position, which I understood was to be used by the Workers' Compensation office at UC to evaluate whether or not I had suffered a work-related disability from performing that job, Epley insisted on inserting the phrase "the job requires the employee to put in the number of hours per week to get the job done"--a phrase which was not part of the job description for the Associate Director position which was originally written for the position when I was hired.

10. During this period, and particularly in response to Epley's unwillingness to consider restructuring the Associate Director position, I inquired about transfer to other UC positions that were open and for which UC was seeking applications. UC has personnel policies governing accommodation of disabled employees. In an interpretive ruling on these policies dated January 17, 1991, Associate Vice Chancellor Encinio stated that one form of accommodation under these policies was to place a disabled employee in an open campus position, where no position was available within the department in which the employee worked. This interpretation was given to me in April 1991, with the explanation that while these were labeled as proposed policies, they stated the current policy. An accurate copy of this interpretative ruling is attached hereto as Exhibit C. At around the same time, UC had also implemented a program to fill open campus job vacancies without recruitment for employees who might be targeted for layoff from their existing positions. I specifically requested participation in that program as well; I was informed, however, that I would have to first accept a layoff--i.e., give up my existing job--before I could participate in the program.

11. Throughout the ensuing months when I was applying for open campus positions, I repeatedly requested preferential consideration for open campus positions for

which I was qualified. UC, however, refused to give me any preferential consideration and relegated me to the normal recruitment process for these jobs. I applied for twenty-nine open jobs at UC (including the Office of the President in Oakland), the Lawrence Berkeley Laboratory, and the Lawrence Livermore Laboratory for which I was qualified. I was told that I was among the top candidates for some of the positions. Ultimately, however, I was not selected for any of these open positions.

12. On May 3, 1991, I was examined by Dr. Melvin Lipsett, a doctor selected by UC's Workers' Compensation office. He issued a report on June 20, 1991. An accurate copy of that report is attached hereto as Exhibit D. In response to his report on June 29, 1991, I was placed on disability leave which began with extended sick leave. Prior to being placed on disability, and since returning to work in March, I had been regularly working at EH&S with Epley without any indication that any new depressive episode was imminent.

13. Dr. Lipsett's report discussed my history of chronic depression. However, his report concluded that I was unable to return to work in any position where I would have to work with Julia Epley. In discovery, I have been Dr. Lipsett's initial written report, prepared a few days after he had examined me. The document reported a personality conflict between me and Ms. Epley, but stated no restrictions on my working as Associate Director. An accurate copy of this initial report is attached hereto as Exhibit E. UC has also produced notes of a telephone call from Dr. Lipsett indicating that no job restrictions were placed upon me (an accurate copy of which is attached hereto as Exhibit F), and notes of a meeting between various UC officials where they decided to provide Lipsett additional information about the work conflict between me and Epley in the hope that Dr.

Lipsett would change his medical opinion (an accurate copy of which is attached hereto as Exhibit G).

14. After being placed on disability leave, I immediately sought review of this situation under UC's personnel policies. A fact-finder, Ross D. McKeen, was appointed to review the situation. In October 1991, McKeen issued a report which recommended that the University seek to resolve the issue of accommodation on appropriate legal and moral grounds, but McKeen did not propose a solution.

15. Thereafter, by letter of October 9, 1991, Vice Chancellor Daniel Boggan, Jr. adopted Mr. McKeen's report and directed everyone involved "to work toward an appropriate resolution." In particular, Boggan directed "you [plaintiff] * * * and Director Epley, to work very closely with Human Resources concerning issues of accommodation." An accurate copy of this letter is attached hereto as Exhibit H.

16. In response, by letter of November 8, 1991, while noting disagreement with some of Mr. McKeen's findings, I accepted the proposal to work on resolving this matter and issues of accommodation. Notwithstanding Boggan's direction, however, nothing occurred. When I raised the issue that nothing was happening as to Boggan's direction to discuss accommodation, UC ultimately responded by letter of August 14, 1992 that I should initiate another internal review proceedings to challenge UC's failure to follow Boggan's directions. An accurate copy of UC's August 14, 1992, letter is attached hereto as Exhibit I.

17. As a result of these actions, I lost income and benefits. I was unemployed through the end of September 1992, at which time I began my present

position which pays $411.92 per months less than my UC position at EH&S ($59,500 vs. $54,557 per year annual salary). In addition, I lost the benefit of a group disability policy, which is not available in my current employment. I have attempted to obtain a private disability policy, but I have been informed that such a policy is unavailable to me at any cost. The closest equivalent protection I can buy on the open market is an annuity policy which would cost $573,906. An accurate copy of a quote concerning this policy/annuity is attached hereto as Exhibit J. While this annuity obviously provides equivalent protection should I become disabled, I recognize that it is not risk-rated and is based on the assumption and possibility that I would become disabled immediately or in the near future. However, my current job does not protect me against disability as my UC job did.

18. I have determined that my lost wages are $26,153 in backpay through the end of September 1992 (when I became reemployed) and an additional $6,178.80 through the end of 1993 (due to the difference in salary between my job at UC and my new job). Projecting this differential for 21 years, until age 65, results in a future loss of wages of $103,803 in constant dollars. I also lost dental and insurance benefits in the additional amount of $531, which I paid to continue these coverages until I was reemployed, and I lost sick and vacation pay of $12,181, as I used this pay to cover my period of disability after losing my Associate Director job.

I declare under penalty of perjury under the laws of the United States and the State of California that the

foregoing is true and correct and that this declaration is executed on December 17, 1993, at San Francisco California.

(s)_____
Joseph J. Voytek

UNIVERSITY OF CALIFORNIA BERKELEY

BERKELEY, CALIFORNIA 94720

OFFICE OF THE CHANCELLOR

October 9, 1991

Mr. Joe Voytek
2736 Webster Street
Berkeley, California 94705

Dear Joe:

I have received and reviewed factfinder Ross McKeen's findings concerning your administrative review and have enclosed a copy for you.

Let me begin my decision in this matter by reiterating the issues under consideration. As I stated in my letter of June 26, consideration of issues regarding termination are premature, because no such action has been taken; consequently, any evaluation as to appropriateness would be merely speculative. The three issues that I can consider at this time are your claims with respect to:

-lack of support for training and development needed to overcome shortcomings in this area;
-lack of adequate staff to complete assigned tasks or, alternatively, new priorities for tasks;
-failure to consider your disability when tasks were assigned following your return from medical leave.

Factfinder McKeen's report points out that this situation involves two hardworking, well-meaning professionals facing a series of management challenges. His principal findings, which I accept, state that there was no indication of a systematic denial of training or unreasonable denial of staff given the context of the management situation. He indicates that actions with respect to reassignment were reflective of an effort to be responsive to your medical condition, and that no termination action has been taken, leaving any assessment of motivation to speculation.

Based upon the factfinder's report, I do not find cause to change actions that have occurred to date. The questions posed in the conclusion to the report focus upon decisions and actions which are very important, but have not yet taken place. I do want to ensure that a diligent effort is made by everyone involved to work toward an appropriate resolution. To that end, I am asking you, and by copy of this letter, Director Epley, to work very closely with Human Resources concerning issues of accommodation.

Sincerely,

/s/_____
Daniel Boggan, Jr.
Vice Chancellor-
Business and
Administrative
Services

Enclosure

cc Director Julia Epley
Interim Director Ben Pope

UNIVERSITY OF CALIFORNIA BERKELEY

Campus Personnel Office
207 University Hall
Berkeley, California 94720

Fax:(510) 642-2888

August 14, 1992

Mr. Christopher Katzenbach
Attorney at Law
2200 Montgomery Street,
Penthouse One
San Francisco, CA 94104

Dear Mr. Katzenbach:

I have been advised that your client, Joseph Voytek, has contacted Lynn Bailiff and expressed concerns about the status of his MAP 70 review and accommodation efforts.

The MAP 70 review process was completed when Vice Chancellor Boggan issued his decision on October 9, 1991. However, I understand there may be concerns about accommodation activities which occurred subsequently. These concerns may be reviewable under MAP 70 as part

of a new complaint. If you would like to discuss this option further, please contact me.

Sincerely,

/s/_____
Debra Harrington
Manager, Employee Relations and Labor Relations

cc: Director Pope
Director Bailiff

(2)

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

No. 96-62

In The Supreme Court Of The United States

OCTOBER TERM 1995

JOSEPH J. VOYTEK,

Petitioner,

v.

UNIVERSITY OF CALIFORNIA and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondents.

Petition for Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

On Brief:

MICHAEL T. LUCEY
GRETA SUMMERVILLE
GORDON & REES
Embarcadero Center West
275 Battery Street
San Francisco, CA 94111
(415) 986-5900

JAMES HOLST
JOHN F. LUNDBERG
JEFFREY A. BLAIR, *Counsel of Record*
Office of the General Counsel
300 Lakeside Drive, 7th Floor
Oakland, CA 94612
(510) 987-9800
Counsel for Respondents
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

12 pp

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENIAL OF THE WRIT . . . 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Braxton v. U.S.
(1991) 500 U.S. 344 [114 L.Ed.2d 585] 5

STATEMENT OF THE CASE

Petitioner worked for The Regents of the University of California ("The Regents") at the University of California at Berkeley ("UCB") campus for several years when he lobbied for and obtained a substantial promotion, including an $11,000 raise, completely restructured responsibilities, and an upper-level management designation. (Petitioner's Appendix ["PA"]:2.) Although petitioner assisted in drafting the job description, almost immediately, he fell behind in his work and began receiving criticism from his supervisor. (PA:2-3.)

Independent of the new job and unknown to The Regents at that time, petitioner had suffered in the past episodes of a condition known as major depression. (PA:6, n. 3.)

Unfortunately, the stress related to being over his head in a job for which he was not qualified and could not handle, led petitioner and his own doctors to conclude that if he did not remove himself from the work place, he might suffer a relapse of major depression. (PA:5-7.) During the entire period in issue, petitioner never in fact suffered major depression.

After a year and one-half in the new management level position, petitioner filed a workers' compensation claim asserting stress from the job and an irreconcilable personality clash with his supervisor precluded him from returning to his job. (PA:5-10.)

Petitioner was examined by a trained, licensed psychiatrist who agreed with petitioner that he could not return to his job, primarily because he could

not work with his supervisor, and further because he could not handle the management-level responsibilities. (PA:Id.)

Petitioner was offered a job transfer to a comparable position with a new supervisor. Plaintiff declined the offer (PA:12-17.) Petitioner was also afforded, at considerable University expense, vocational rehabilitation services including job training and guidance with skills in interviewing. Through those efforts, petitioner ultimately landed a job with the United States government in a non-management position, earning approximately the same salary as he had been earning at UCB.

Petitioner contended below that The Regents should have accommodated him under the Rehabilitation Act. On summary judgment, the district court found the

University had accommodated petitioner through the substantial vocational rehabilitation efforts and, through offering petitioner a comparable position. The court also found undisputed evidence that the petitioner was not qualified to perform the job in question because of his irreconcilable personality conflict with the supervisor and because he lacked the requisite management skills to perform the essential functions of the job. (PA:3, 31, 33-38.) Each of these findings are well-documented by the trial court and serve as the basis for affirmance by the Ninth Circuit. (See, generally, PA:1-60.)

REASONS FOR DENIAL OF THE WRIT

This case presents none of the circumstances listed in this Court's Rule

10, which the rule suggests guides the exercise of this court's discretion in granting review.

The decision below is an unpublished decision by the Ninth Circuit, affirming an unpublished District Court opinion. Neither decision is in conflict with any other Ninth Circuit decision or any other circuit or district court decision.

The issue decided at the district court and affirmed by the Ninth Circuit was simply that, on the evidence presented, both in favor of and in opposition to summary judgment, petitioner failed to establish disputed issues of material fact with regard to (1) whether plaintiff was "otherwise qualified" for the management-level position; and (2) whether the University had reasonably accommodated his mental

condition. The district court's 46-page opinion carefully detailed why there was no disputed issues of material fact with regard to either of these issues and why The Regents was entitled to judgment as a matter of law. The Ninth Circuit simply affirmed the propriety of the district court's ruling.

The decision sought for review is thus simply one in which both courts correctly exercised their authority under rule 56 of the Federal Rules of Civil Procedure governing summary judgment. There was no unique rule of law construed and both courts properly cited and relied upon the ample Ninth Circuit precedent on disability discrimination. There is no purpose served by accepting this petition. (Braxton v. U.S. (1991) 500 U.S. 344 [114 L.Ed.2d 585].)

Petitioner briefs the issue now suggesting the trial court should somehow not have relied on the competent, admissible expert evidence of a private licensed psychiatrist on a material fact issue. This "issue" is contrary to the generally known rules governing evidence and use of expert testimony and certainly does not warrant review by this court. In any event, there was no evidence presented below that the expert opinions were inappropriate, without foundation or not credible. To the contrary, the expert was neutral and based his opinion on generally accepted scientific and psychiatric findings, and was entirely credible. (PA:39-40.)

Petitioner also asks this Court to review whether the Americans with Disabilities Act ("ADA") applies to positions the petitioner applied for

while on stress leave. Review should not be granted because the district court correctly found that petitioner's ADA cause of action accrued before the application of the ADA, and that the continuing violations doctrine did not apply on the facts presented. Equally important, because the district court found the standards governing the disability issues in question under either the Rehabilitation Act or the ADA were substantially the same, any ADA claim was equally without merit and properly subject to dismissal by summary judgment. (PA:44-45.)

CONCLUSION

For the reasons stated above, Respondent respectfully prays that the petition be denied.

Dated: 7-19-96

By: _____

JEFFREY A. BLAIR
OFFICE OF THE GENERAL COUNSEL
300 Lakeside Dr., 7th Fl.
Oakland, CA 94612
(510) 987-9800
Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

On Brief:

MICHAEL T. LUCEY
GRETA SUMMERVILLE
GORDON & REES
275 Battery Street, 20th Fl.
San Francisco, CA 94111
(415) 986-5900